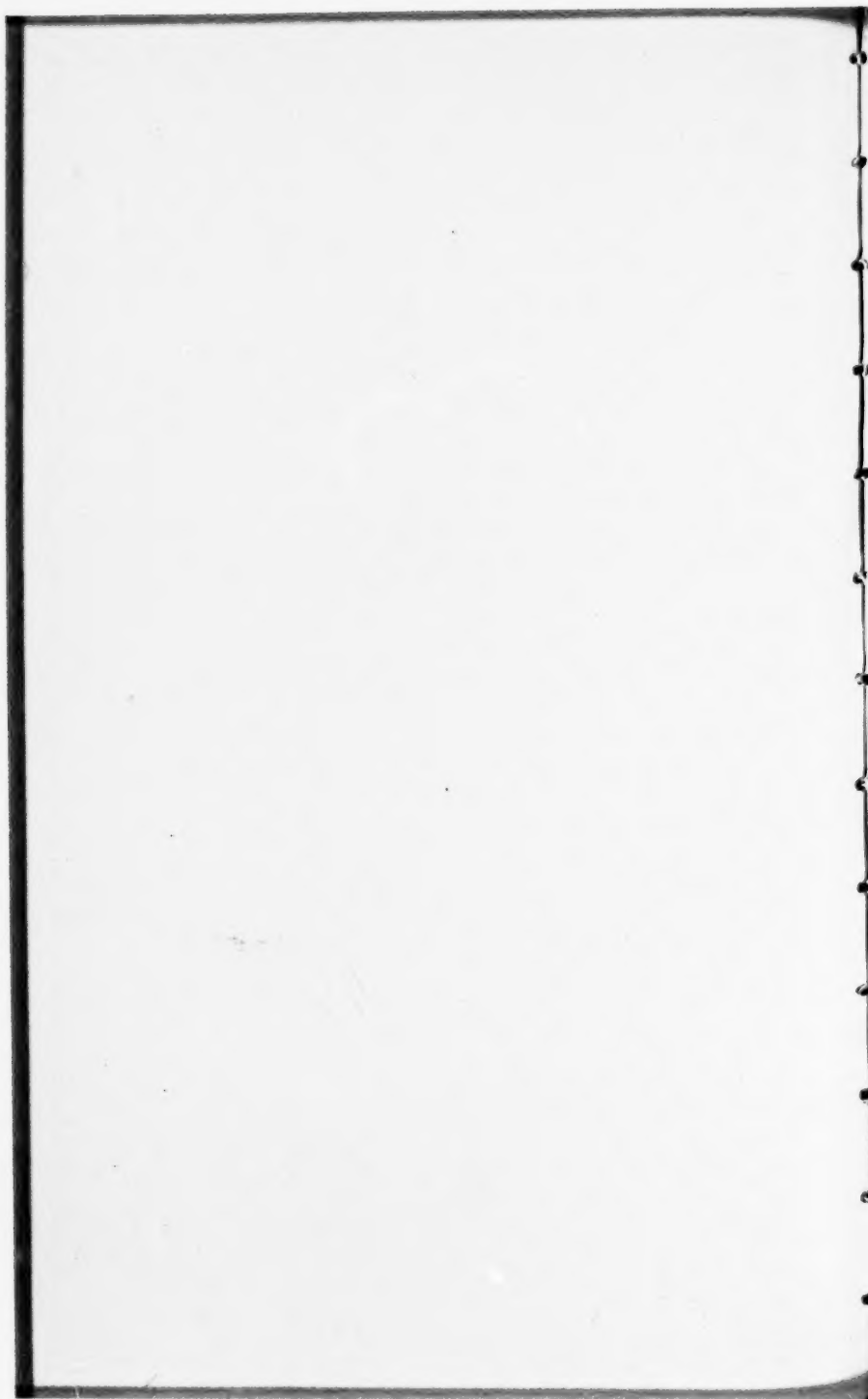


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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

In the Matter of the PETITION OF THE UNITED STATES
OF AMERICA, AS OWNER OF NINETEEN BARGES
AND FOUR TOWBOATS.

**MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF PROHIBITION OR MANDAMUS.**

Now comes Harry M. Daugherty, Attorney-General of the United States, in behalf of the United States of America, owner of nineteen (19) barges and four (4) towboats, and moves:

(1) For leave to file the petition for writ of prohibition hereto annexed; and

(2) That a rule be entered and issued directing the District Court of the United States for the Eastern District of Missouri, and the Hon. C. B. Faris, a Judge thereof, and the other Judges and officers of said court, to show cause why a writ of

prohibition should not issue against them and each of them in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief herein as may be just.

Harry M. Daugherty,
Attorney-General for the United States of America.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

In the Matter of the PETITION OF THE UNITED STATES
OF AMERICA, AS OWNER OF NINETEEN BARGES
AND FOUR TOWBOATS.

PETITION FOR A WRIT OF PROHIBITION.

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United
States:

The petition of Harry M. Daugherty, Attorney-General of the United States, on behalf of the United States of America, owner of nineteen (19) barges and four (4) towboats, against the Hon. C. B. Faris, a Judge of the District Court of the United States for the Eastern District of Missouri, and the other Judges of said court, respectfully represents:

That on the 25th day of March, 1923, one Edward F. Goltra commenced a civil suit in the District

Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, by the filing of his bill of complaint against John W. Weeks, as Secretary of War, T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, then United States District Attorney for the Eastern Division of the Eastern Judicial District of Missouri, who has since resigned and his successor appointed, as defendants, in which it was averred inter alia that on or about the 28th day of May, 1919, a certain contract was made and entered into between the United States of America, represented by Major-General William M. Black, Chief of Engineers of the United States Army, directed by the Secretary of War so to represent the United States as lessor, and the said Edward F. Goltra as lessee, whereby nineteen river barges and four towboats, owned, and then under construction, by the United States of America were leased and chartered to the said Edward F. Goltra for a period of five (5) years from the date of the delivery of said boats and barges to him, conditioned upon the payment of certain periodical rentals and the compliance on the part of the said Edward F. Goltra with certain other terms and conditions on his part to be performed under said contracts. Said contracts of lease further provided that the title to said boats

and barges should remain in the United States during the term of said lease; that upon the expiration of said lease the said Goltra should have the right and privilege of purchasing said boats and barges upon the payment of the value thereof as determined by three appraisers therein provided for, the rentals payable and paid by the lessee during the term of said lease to be considered as payment pro tanto of such purchase price; that said boats and barges should be operated by the said Edward F. Goltra during the term of said lease as a common carrier upon the Mississippi River in the carrying of pig iron, coal and other commodities; and the right was reserved to the lessor in said contract to terminate said lease and retake possession of said boats and barges if in the judgment of the lessor the said Edward F. Goltra had not complied with the terms and conditions on his part to be performed thereunder.

It was further alleged in said bill that said boats and barges were not delivered to the said Edward F. Goltra until the 15th day of July, 1922; that thereafter, on March 3, 1923, petitioner John W. Weeks, as Secretary of War of the United States of America, wrongfully undertook to cancel said contract of lease for the noncompliance by the said Edward F. Goltra, as lessee, with its terms and conditions, and demanded the return of said boats and barges to the United States of America, and that on or about the

25th day of March, 1923, said defendants did unlawfully retake possession of some, and were about to retake possession of the remainder of said boats and barges.

The prayer of said bill was for a temporary restraining order commanding petitioners John W. Weeks, as Secretary of War of the United States, and T. Q. Ashburn, as Chief Inland and Coastwise Waterways Service of the United States, and likewise, James E. Carroll, as United States District Attorney, to return to the complainant, Edward F. Goltra, the boats and barges so taken by them as aforesaid, and restraining them from interfering with plaintiff's possession thereof; also for a temporary injunction enjoining the said John W. Weeks, as Secretary of War, from doing any act whatsoever looking to the cancellation and termination of said contract of lease, and enjoining said Ashburn and Carroll from aiding or abetting the said John W. Weeks, as Secretary of War, in the cancellation of said contract, or in the retaking of said boats and barges upon the cancellation of said contract; and that upon final hearing a decree be entered by the Court in favor of the said Edward F. Goltra, as complainant, determining the rights of the said Edward F. Goltra under said contract, and perpetually enjoining defendants from interfering in any way with his rights

thereunder. Said bill of complaint is attached hereto and marked "Exhibit I."

Upon the presentation and filing of said bill of complaint, as aforesaid, the Hon. Charles B. Faris, as Judge of the District Court of the United States for said division and district as aforesaid, on the 25th day of March, 1923, issued a mandatory and restraining order against defendants, as prayed in said bill, and an order to show cause why a temporary injunction should not be issued, which said order is set forth in the certified copy of the record entries attached hereto at page 78.

On April 6, 1923, the Attorney-General of the United States filed in said cause his suggestions against the jurisdiction of the Court, on the ground that the suit was, in effect, a suit against the United States, which is attached hereto and marked "Exhibit 2."

Thereafter, on the 14th day of April, 1923, petitioners T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and John W. Weeks, as Secretary of War, filed their returns to the order to show cause why a temporary injunction should not be issued as prayed in said bill of complaint, copies of which are hereto attached, marked "Exhibit No. 3" and "Exhibit No. 4," in which it was averred inter alia that the suit or cause of action set forth in said bill of complaint upon

which said order was made was, in purpose and effect, a suit against the United States and its property, of which the Court had no jurisdiction, because the United States had not consented to the institution of such suit against it, and that petitioners as aforesaid had no interest in said boats and barges except in their representative capacities as officers of the United States.

Thereafter, on the 21st day of April, 1923, the defendants in said cause filed a motion therein, a copy of which is hereto attached, marked "Exhibit No. 5," to dismiss said cause and the bill of complaint filed therein, on the ground that the bill or complaint, while not nominally against the United States, was in its essence, purpose and effect a suit and proceeding against the United States and its property, and that the Court had no jurisdiction of said cause, because the United States had not consented to the institution of said suit against it.

Thereafter, on the 30th day of April, 1923, said motion of petitioners as aforesaid to dismiss said cause, and the bill of complaint filed therein, was overruled and denied by the Court.

Petitioners further show to the Court that unless restrained by the order of this Honorable Court, the Hon. Charles B. Faris, as District Judge of the Eastern Division of the Eastern Judicial District of Missouri, will proceed with the further determination of

said cause and will issue a temporary injunction commanding your petitioners to return said boats and barges, which are now in their possession as officers of the United States, to the said Edward F. Goltra, and will enjoin your petitioners from retaking or interfering with the possession of said boats and barges by the said Edward F. Goltra pending the final determination of said cause. That such an order will deprive the United States of the possession and use of said boats, of the value of approximately \$3,800,000.00.

Petitioners further show to the Court that in addition to the notice of the cancellation and termination of said contract given to the said Edward F. Goltra by petitioner John W. Weeks, as Secretary of War, on the 3rd day of March, 1923, as set forth in the bill of complaint filed in said cause, marked "Exhibit No. 1" hereto, Maj. Gen. Lansing H. Beach, Chief of Engineers of the United States Army, now occupying the office held by William M. Black on the 28th day of May, 1919, at the time of the making of said contract of lease, but who has since been placed, and is now, on the retired list of the United States Army, did, on the 27th day of April, 1923, terminate and cancel said contract for and on behalf of the United States, lessor, on the ground that said Edward F. Goltra had not, in his judgment, complied with the terms and conditions of said contract on his part to

be performed, and had failed to operate said boats and barges as a common carrier, and a written notice, a copy of which is hereto attached as Exhibit No. 6, was duly served upon the said Edward F. Goltra on the 30th day of April, 1923.

A certified copy of the docket entries in the said cause is attached hereto and marked "Exhibit 7."

The motion to quash the service mentioned in the docket entries as being filed by defendant Ashburn and overruled by the Court only presented the question of the sufficiency of personal service upon that defendant, and not material to this controversy, and, therefore, is not set out.

The return of defendant Carroll to the order to show cause denied any participation in the proceedings connected with the taking of the boats, is immaterial to this controversy, and, for that reason, is not set out.

Petitioners further show to this Honorable Court that the aforementioned proceedings and suit is in reality and effect a suit against the United States; that said boats and barges belong to, and are the property of, the United States, and that the contract of lease, which is the basis of said suit, and under which the said Edward F. Goltra claims the right to the possession of said boats and barges, was a contract between the United States of America and the said Edward F. Goltra, and that as the United States

of America has not consented to the institution of said suit and proceeding against it, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri has no jurisdiction of said cause and proceeding, and that the acts and orders already made by said Court in said cause, and any further orders made and entered by the Court therein, will be in excess of its jurisdiction.

Wherefore your petitioners, the aid of his Honorable Court most respectfully requesting, pray remedy by a writ of prohibition to be issued out of this Honorable Court directed to the Hon. Charles B. Faris, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, before whom said cause and proceeding is pending, and the other Judges of said court, to prohibit him and them from asserting and exercising jurisdiction over such suit and proceeding, and from further exercise of jurisdiction in said cause or the enforcing of any order, judgment, or decree made under color thereof.

HARRY M. DAUGHERTY,
Attorney-General of the United States
of America.

I have read the foregoing petition, and the facts therein stated are true to the best of my information and belief.

.....



EXHIBIT NO. 1.

Eastern District of Missouri. }
United States of America, } ss.

In the District Court of the United States for the
Eastern Division of the Eastern Judicial
District of Missouri.

Edward F. Goltra,
vs. Plaintiff,

John W. Weeks, Secretary of War
of the United States, Colonel
T. Q. Ashburn, Chief Inland and
Coastwise Waterways Service
of the United States, and James
E. Carroll, United States Dis-
trict Attorney,
Defendants.

To the Honorable Judges of the District Court of
the United States for the Eastern Division of
the Eastern Judicial District of Missouri:

Plaintiff for his cause of action herein respect-
fully shows to the Court that the plaintiff is a res-
ident of the City of St. Louis and a citizen of the
State of Missouri and was such at all times herein-
after mentioned; that the defendant John W. Weeks
is the Secretary of War of the United States of
America; that the defendant Colonel T. Q. Ashburn
is Chief of the Inland and Coastwise Waterways
Service of the United States of America; that the

defendant James E. Carroll is the District Attorney of the United States for the Eastern District of Missouri; that the matter in controversy herein between the plaintiff and the said defendants exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and arises under the Constitution and Laws of the United States.

I.

Plaintiff respectfully shows to the Court that prior to the 28th day of May, 1919, the plaintiff had been in negotiations of various kinds with representatives of the Government of the United States, and particularly of the War Department and the then Secretary of War, whereby it was planned as an emergency of war to supply to the United States large facilities for the increase of the output of pig iron and other iron properties in order to supply the emergency demand for munitions of war in the conflict wherein the United States was a belligerent; and the plaintiff herein, Edward F. Goltra, at the special instance and request of the representatives of the United States, entered into arrangements and began the preparation at great cost of time and money to himself for establishing plants and transportation facilities for the production and output of iron ore and coal and many by-products thereof needed by the United States as such emergency of war, and which plans and purposes were partly carried out and would have cost more than \$100,000,000. That the plan as then contemplated included the construction by the United States under the direction and authority of the United States Shipping Board

Emergency Fleet Corporation of a fleet of towboats and barges for the primary purpose of transporting said iron and coal to and from St. Louis, Missouri, to the plant or plants which were to be provided by the said Edward F. Goltra, the plaintiff herein, and for the purpose of the construction of said fleet there was allotted by the government to the Chief of Engineers thereof the sum of \$3,860,000; and the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal, and the construction of a fleet of towboats for the purpose of towing such barges was officially declared by the then Secretary of War as necessary to enable the government to dispose of the said barges more advantageously, for the reason that the said fleet of towboats and barges was and is especially designed for and adapted to the transportation of iron ore and coal.

II.

Plaintiff further avers and respectfully shows to the Court that at and after the signing of the Armistice in the World War in which the United States was a belligerent, to wit, on and after the 11th day of November, 1918, the Emergency of War referred to had ceased and the Government of the United States and the plaintiff herein, Edward F. Goltra, each in its or his own respective way, were left in a position wherein it became impossible and unnecessary to carry out the plans for the mutual advantage of each and for the necessities of the government which had theretofore been contemplated and begun as aforesaid. Thereupon and thereafter such

negotiations were had between the plaintiff herein, Edward F. Goltra, and the duly authorized representatives of the United States of America, and more especially of the War Department and the Secretary of War, that a contract was entered into between the said plaintiff and the United States for the future disposition of the said proposed fleet of towboats and barges hereinbefore referred to, which contract was in writing, and is in words and figures as follows, to wit:

1. This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second part, witnesseth, that

Whereas, the party of the second part, at the request of certain government officials as an emergency of war, in order, to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to producing pig iron at St. Louis, Missouri; and

Whereas, the United States Shipping Board Emergency Fleet Corporation allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

Whereas, on the first day of August, 1918, the United States of America entered into contracts for

the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

Whereas, the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which, in the opinion of the Secretary of War, is necessary to enable the government to dispose of the said barges more advantageously; and

Whereas, the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

Whereas, the said lessee has entered into various engagements and undertaking to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities:

Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat, the following-described property, viz.:

Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa.,

and the Dubuque Boat and Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

It is thereupon covenanted and agreed between the said parties as follows:

2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made, provided the **Secretary of War** consents to such use other than as a common carrier.

(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the **satisfaction of the lessor**; and shall hold the United States entirely free from all liabilities and indebtedness of every kind in connection with the operation, care and maintenance of the entire fleet and all its engines, boilers, outfit, tackle, apparel, furniture and appurtenances; and the lessee shall, without unnecessary delay, as soon as he acquires any knowledge thereof, discharge any and all maritime liens that may at any time during the continuance of this lease from any cause arise against or become impressed upon any one, any or

all of the fleet of nineteen barges and three or four towboats. The lessee shall procure and take out for the benefit of the United States, insurance, both fire and marine, in such an amount as in the judgment of the **Secretary of War** each of the vessels may require and with such underwriters or in such companies as are approved by the lessor, insuring each and every one of the barges and towboats against physical injury to them, or any of them, and against the loss of any or all of the barges and towboats hereby leased. The lessee shall likewise procure and take out fire, marine and towers liability insurance in such an amount as in the judgment of the **Secretary of War** each of the vessels may require, with such underwriters or in such companies as shall be approved by the lessor, and for the benefit of the United States, insuring each of the vessels against such injury as may be inflicted by such vessel upon other property, such as might result in maritime liens, or in liability or obligation by the lessor, and, if the lessor shall require, execute and deliver to the lessor a bond in the penal sum of three hundred thousand (\$300,000) dollars, conditioned to protect the United States against such liability or obligation and against any and all maritime or other liens against the fleet or any of the vessels of the fleet and against any and all depreciation in value of all or any of said vessels by reason of maritime or other liens arising or becoming impressed upon them or any of them. Such bonds as in any part of this contract are required to be given by the lessee for the benefit of the United States shall always and at all times during the continuance of this lease be

kept good and shall be replaced at any time by other good and sufficient bonds at the request of the lessor, and they shall be kept good not only against the impaired creditor or financial responsibility of the obligor or surety, but also against partial depletion or entire exhaustion thereof brought about by the payment of losses or indemnities thereunder.

(b-1) All salvage earned, to which any of the said fleet shall become entitled, shall be for the benefit of the **United States**, after deducting all expenses incident thereto and the proportion due to the master, officers and crew.

(c) For the protection of persons furnishing materials, services and labor in connection with the operation, furnishing, repair, care and maintenance of the said towboats and barges, the lessee shall furnish to the lessor and continue in effect during the period of the lease, and in case of sale until title passes to the purchaser, a good and sufficient bond, approved by the lessor, in the penal sum of two hundred thousand (\$200,000) dollars.

3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the **Secretary of War** as soon as practicable after each proper determination of the amount thereof, but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the **Secretary of War** in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost

at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet, and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the **Secretary of War** at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by **the lessor**, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall, until all vessels of the Government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

The lessee shall keep accurate detailed accounts of all tonnage moved and of all moneys received and due and of all items of operating costs, and his accounts shall at all times be subject to inspection by the lessor or his representatives. The overhead expenses included in operating costs shall be subject to the **approval of the lessor**, and any items not approved by him and to which the lessee may object or take exception shall be referred to the **Secretary of War**, whose decision shall be final.

4. The approved national banks shall be required to furnish good and sufficient bonds, approved by **the lessor**, in penal sum in amounts at least equal to the sum deposited conditioned for the safety of the funds held on deposit, as provided in this lease, said bonds

to be delivered to the custody of **the lessor** and to be maintained during the period of the deposit. The said banks shall credit to the account interest at the local prevailing rates of nonchecking accounts.

5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by **the lessor**, one by the lessee, and one by the said two members, unless they shall fail to agree, in which case the third member shall be appointed by the **Secretary of War**, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be

less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War, shall be as follows:

There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the

property shall remain in the **United States** until the payment of the whole of the purchase price of said property.

7. It is understood and agreed that the lessee assumes full responsibility for the safety of his employes, plant and mtaerials, and the said nineteen barges and three or four towboats, and for any damage or injury done by or to them and from any source or cause in the operation of the fleet.

8. The **lessor** reserves the right to inspect the plant, fleet and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; and noncompliance, in **his judgment**, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

9. In the performance of the conditions of this lease, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several states, territories or municipalities having criminal jurisdiction is prohibited.

10. No member or delegate to Congress, or resident commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this

contract, or to any benefit which may arise herefrom; but under the provisions of Section 116 of the Act of Congress approved March 4, 1909 (35 Stats. 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

It witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

Witnesses:

John Stewart,
Lt. Col. of Engineers,

as to

William M. Black, (Seal)
Major General, Chief of Engineers,
U. S. Army (First Party).

_____,
Lt. Col., Engrs.,

as to

Edward F. Goltra, (Seal)
(Second Party).

The insertion of the words "three or" in the thirteenth and nineteenth lines of page 2, the seventh line of page 3, and the fifteenth line of page 7 are correct and were made before the contract was completed.

William M. Black,
Maj. Gen., Chief of Engr.,
First Party.

Edward F. Goltra,
Second Party.

It is further understood and agreed between the said William M. Black, Chief Engineers, United States Army, and Edward F. Goltra, parties of the first part and of the second part, respectively, of the above contract, that the number of towboats to be supplied under the above contract, denominated "three or four" therein, shall be at least three, and that a fourth shall be supplied only in the event that four suitable towboats of the general type and power described in the request for proposals now being canvassed for four towboats for the upper Mississippi River can be obtained with the funds available as specified in the second whereas of the above contract, and not otherwise.

William M. Black.

Witness:

John Stewart,

Lt. Col. of Engineers.

Edward F. Goltra.

Witness:

James M. Hoffman,

Capt., Engrs., U. S. A.

III.

Plaintiff further avers and shows to the Court that after the execution of the foregoing contract, to wit, on the 28th day of May, 1919, the plaintiff began his preparations for carrying out the terms of said contract if and whenever the said towboats and barges called for by said contract should be delivered to him in conformity with the terms and conditions of said contract. But the conditions relating to the subject matter of said contract were such and so

difficult and so impossible of completion by the plaintiff on his part unless and until the Government should put the plaintiff in a position to undertake and complete the practical execution of said contract by providing the towboats and barges and other facilities called for in said contract to be provided by the United States to the plaintiff. And thereupon and thereafter further negotiations were entered into with reference to the subject matter of said contract wherein and whereby the United States, as represented by its proper officials thereunto duly authorized, informed the plaintiff that it was advantageous and in the best interest of the United States to modify the said contract for the following reasons: "To more fully provide for the operation of said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of \$3,860,000 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions."

And thereupon and thereafter the plaintiff herein, Edward F. Goltra, set about the providing of the necessary tract of land and runway on which the unloading facilities, mentioned in said supplemental contract of May 27th, 1921, were to be erected and proceeded with the construction of said runway and other equipment, appurtenances, and appliances connected therewith and completed the same in manner and form as provided and required by said supplemental contract. And the plaintiff avers and shows to the Court that the plaintiff in all things complied

with all of the terms of the said two contracts, viz., the contract dated May 28th, 1919, and the supplemental contract dated May 27th, 1921. And the plaintiff avers that he has complied with every demand or requirement made of him by either the Secretary of War or Chief of Engineers of the United States named as lessor in the said contracts. And the plaintiff avers that his said compliance with the terms of the said contract as aforesaid was in the face of most unjust interference and restrictions interposed by the defendants herein and other persons representing the said defendants and the Government of the United States in that behalf, as will be more fully hereinafter set forth.

The said supplemental contract is in words and figures as follows, to wit:

Whereas, on the 28th day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) towboats belonging to the United States.

And whereas it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified for the following reasons:

To more fully provide for the operation of the said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of \$3,860,000 from the United States Shipping Board **Emergency Fleet Corporation**, and to provide for the sale of the said unloading facilities to the lessee under certain conditions:

Now, therefore, the said contract is, by this supplemental agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:

The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and runway on which the said unloading facilities are to be erected, stand, and operate, said tract to be selected by the lessor, subject to approval by the lessee, and said runway to be built according to plans submitted by lessee and approved by the lessor.

The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and character mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

The terms of the original lease as to net earnings (paragraph 3), appraisement, and option to purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8), shall govern so far as applicable and pertinent to the said unloading facilities.

In case the said lessee, his heirs, administrators, executors, or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case the lessor may, without let or hindrance by the said lessee, his heirs, administrators, executors, or assigns take said unloading facilities in the same manner as it provided in the original lease as to the brages and towboats, or

In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

This supplemental agreement shall be subject to the approval of the Secretary of War.

In witness whereof the parties aforesaid have here-

unto placed their signatures at the time of execution
of this agreement:

Witnesses:

P. J. Dempsey,
as to Lansing H. Beach,
Major General, Chief of Engineers.

Thomas M. Robbins,
Major, Corps of Engineers.

as to Edward F. Goltra.

Approved May 27, 1921.

J. M. Wainwright,
Assistant Secretary of War.

Plaintiff further avers that towboats and barges mentioned and contemplated in the said contract and supplemental contract were in course of construction by the Government at the time of the execution of the said original contract dated May 28th, 1919, and were not completed until long after said date and were not delivered to the plaintiff until long after the execution by the parties thereto of the said supplemental contract dated May 27th, 1921, to wit, the 15th day of July, 1922, and the plaintiff avers that at the date of the delivery of the said towboats and barges to the plaintiff, to wit, on July 15th, 1922, the said towboats and barges were not in proper condition for delivery in that they were defective in parts and were not properly constructed for the uses and purposes for which the said towboats and barges were designed, and were not constructed and adapted for the uses and purposes which were in contemplation of the parties at the time of the execution of said two contracts, dated, respectively, May 28th, 1919, and May 27th, 1921. The plaintiff

avers that such and so many were the defects, as aforesaid, that numerous and varied repairs were necessary to be made in order to complete the said towboats and barges and to put them in the proper condition for the service for which they were designed by the parties to said contracts and such condition as was necessary for their operation. And plaintiff avers that it was necessary to make, and the plaintiff did make, at his own cost and expense exceeding the sum of \$10,000 per boat, the repairs thus made necessary for the operation of said boats.

IV.

The plaintiff further avers and respectfully shows to the Court that at the time of the execution of the original contract herein, dated May 28th, 1919, and at all times prior thereto after the signing of the Armistice in the World War, to wit, November 11th, 1918, the sudden change of conditions from war to peace presented many and varied difficulties, both governmental and personal, to the parties to the said contracts hereinbefore set forth, and especially in this, to wit, by mutual agreement between the plaintiff and the representatives of the United States as set forth earlier in this bill the undertakings by the parties hereto contemplated the expenditure of huge sums of money for the purposes intended, to wit, by the plaintiff, on the one hand, to supply plants, iron ore, and coal for the production of pig iron and other commodities necessary for the manufacture of munitions of war, and by the Government, on the other hand, in the purchase and transportation of such products.

And plaintiff further avers that prior to the making of said contracts the attempts by the Government and others to carry freight by towboats and barges on the Mississippi River had been unsuccessful in that the towboats and barges had been run at a financial loss. And plaintiff avers that the plaintiff had been for a long time prior thereto familiar with the uses and attempted development of boats and barges on the Mississippi River and was peculiarly qualified to put forward and complete the plans in contemplation by the parties to said contracts at the time of executing said contracts; and the knowledge and experience of the said plaintiff was well known to the representatives of the Government who participated in said several negotiations and contracts and was taken into consideration in the making of said two contracts dated May 28th, 1919, and May 27th, 1921.

But the plaintiff avers that at the time of making said contracts it was well understood and known to the representatives of the Government that the plans and purposes therein contemplated were of necessity experimental in kind and required time in their development because of previous ineffective efforts to use the Mississippi River for similar purposes and because of the absence of current freight traffic of merchants and shippers on steamboats running upon the Mississippi River and the absence of public use and confidence in freight traffic on the Mississippi River. And said conditions were taken into consideration by the representatives of the Government in the making of said contracts. But, nevertheless, plaintiff avers that after the time of making said contracts the plaintiff had secured divers and sundry

contracts and agreements for the shipment of commodities of different kinds on the said barges, including hundreds of thousands of barrels of oil from New Orleans to Roxana, Illinois, coal from Kentucky to St. Louis up to 2,000 tons a day, manganese from New Orleans to St. Louis, and plaintiff had contracts or oral promises for shipment of various other commodities.

Plaintiff further avers that it is provided by section 2a of the said contract of May 28th, 1919, as follows:

“2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War, but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made, provided the Secretary of War consents to such use other than as a common carrier.”

Plaintiff avers that in and by said contract as set forth in said section 2 (a) in connection with other provisions of the said contract the plaintiff was required to operate as a common carrier the said fleet of towboats and barges upon the Mississippi River and its tributaries in the transportation of iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the

prevailing rail tariffs without the consent of the Secretary of War, and at the same time under said section of said contract it was provided that the plaintiff was to be permitted to make the most profitable and advantageous use of the said vessels as possible, but subject, however, to the right of the Secretary of War to determine what use might be made by the plaintiff of said vessels otherwise than as a common carrier.

Plaintiff further avers that the rate which plaintiff arranged with the proposed shippers of grains, oil, coal, manganese ore and other commodities was based upon eighty per cent (80%) of whatever the prevailing rail rate was at the time of shipment. And plaintiff avers that when said rates were submitted to the Secretary of War for his consideration such proceedings were had by negotiation, discussion and correspondence between the Secretary of War or his representatives and this plaintiff; that permission could not be obtained by the plaintiff from the Secretary of War to transport some of said commodities, and as to other commodities, notably grain, such conditions were imposed as required the plaintiff before contracting or receiving for transportation the articles to be transported without obtaining first the consent from time to time of the Federal Manager in charge of the Mississippi-Warrior River Service, a Government officer, or his representative in St. Louis, as to the amount of grain or such commodity which the plaintiff would be permitted to receive for transportation on said barges mentioned in said contract.

And the plaintiff further avers that by reason of such rulings and directions from the Secretary of

War and by reason of the vagueness and indefiniteness of the right and authority granted to the plaintiff as to transportation and rates of freight the plaintiff was placed in a position where it was impossible in law for him to operate as a common carrier and thereby receive from all persons offering freight of specific kinds under similar conditions and to publish rates with the Interstate Commerce Commission as to his freight rates without making himself liable in damages to persons who should offer freight of the kinds described for transportation on the boats of the plaintiff except by the limitation of obtaining the consent of the Government official for the transportation of the specific freight offered. And the reasons assigned by the Secretary of War and the representatives of the United States for this action in so refusing the plaintiff permission to act as a common carrier as aforesaid was that if such permission was granted the plaintiff, a citizen of Missouri and of the United States, who was required by the said contracts to be a common carrier, would be in competition with the Government of the United States in operating boats and barges under what is known and designated by the Government as the Mississippi-Warrior Service. The plaintiff avers that the said Secretary of War in divers and sundry other ways failed on behalf of the Government to make provision whereby the plaintiff under said contract could operate as a common carrier as required by section 2a of said original contract of May 28th, 1919, or could act as a private carrier in the alternative or act otherwise in such a way as would enable the plaintiff to make

the most profitable and most advantageous use of said vessels in any way other than as a common carrier as is provided in the alternative in said section 2a of said original contract. And the plaintiff therefore avers that by the acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contracts from carrying out the terms and conditions of the said contracts as a common carrier or as a private carrier or in any other manner provided by said contracts; and it became and was and is impossible for the plaintiff to so carry out the contracts under the terms and conditions thereof, unless and until the **lessor therein, being the United States**, causes and permits the plaintiff to carry out the conditions of said contracts in manner and form and for the purposes contemplated by said contracts and for the mutual benefit and advantage of the United States and of this plaintiff.

V.

The plaintiff further avers and shows to the Court that said contract of May 28th, 1919, and said supplemental contract of May 27th, 1921, constitute in law a contract of charter and lease to the plaintiff for a term of five years of the said towboats and barges mentioned therein and also a contract of privilege and option in the plaintiff to purchase the same on the terms and conditions therein stated, together with the unloading facilities mentioned and described in said supplemental contract. And said contracts established in the plaintiff, by virtue of their terms and

conditions and of the considerations moving the plaintiff and the United States thereunto, a fixed and definite property right in said towboats and barges and in said unloading facilities and in the land on which said unloading facilities were constructed, of which rights, respectively, the plaintiff could not be lawfully deprived, except by a proceeding in equity for an accounting and a determination by a decree of court of the lawful interest of each of the parties thereto in the subject matter of said contracts. And the plaintiff avers that notwithstanding such rights in the plaintiff, the defendant, John W. Weeks, purporting to act as Secretary of War of the United States, and the defendants, Colonel T. Q. Ashburn, purporting to act as Chief of Inland and Coastwise Service, and the defendant, James E. Carroll, purporting to act as United States District Attorney for the Eastern Division of Missouri, acting each for himself and in combination one with another, on or about the 3rd day of March, 1923, and thereafter, did wrongfully and unlawfully undertake to declare said contracts terminated and did demand from the plaintiff the immediate possession of the said boats without warrant of law, and did wrongfully and unlawfully and arbitrarily threaten to take by force the said towboats and barges and unloading facilities described in said two contracts, and did cause to be begun the actual seizure of some of said towboats and barges by persons pretending and purporting to represent the United States and acting under instructions of the said defendants herein. Each and all of which unlawful acts the said defendants are now threatening to repeat, unless said towboats, barges

and unloading facilities are surrendered and delivered to them by the plaintiff voluntarily and at once. And plaintiff avers that the said defendants will in fact wrongfully and unlawfully and arbitrarily seize and take away from the plaintiff the said property, to the irreparable injury of the plaintiff, unless restrained and enjoined therefrom by this Honorable Court.

And plaintiff avers that he has no adequate remedy at law for the redress of the wrongs herein complained of. And plaintiff further avers that in furtherance of their said wrongful acts as aforesaid, the said defendant, John W. Weeks, purporting to act as Secretary of War of the United States, on the 4th day of March, 1923, said day being Sunday, caused the defendant, Colonel T. Q. Ashburn, purporting to act as Chief of Inland and Coastwise Service of the United States, under the instructions of said defendant Weeks, to deliver to the plaintiff a communication which is in words and figures as follows, to wit:

· War Department,
Washington, March 3, 1923.

E. F. Goltra, Esq.

La Salle Building, St. Louis, Missouri.

Sir: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said

towboats and barges as a common carrier and in other particulars.

I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is instructed and authorized to receive and receipt for the property herein mentioned.

Yours very truly,

John W. Weeks,

Secretary of War.

And at said time said defendant, John W. Weeks, gave to defendant, Colonel T. Q. Ashburn, instructions in writing as follows:

War Department,

Washington, March 3, 1922.

Memorandum for Colonel Ashburn:

My instructions in reference to the cancellation of the Goltra contract are that you proceed to St. Louis, Missouri, and deliver to Edward F. Goltra in person the notice herewith inclosed of the termination of his contract and the supplement thereto, and make demand on him for the return of possession of said property to you as the agent of the United States, giving to him proper receipts for all of said property so delivered to you.

In the event of his failure or refusal to make delivery of the property demanded, you will apply to

the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property.

John W. Weeks,
Secretary of War.

Which said communication from defendant Weeks to the plaintiff was handed to the plaintiff by said Colonel Ashburn in Washington, D. C., on Sunday, the 4th day of March, 1923.

But plaintiff avers that no notice or opportunity for a hearing as to his rights, either before the Secretary of War or before any court, had been served or sent to the plaintiff prior to said notice, dated March 3, 1923, of the termination of said contracts.

Plaintiff avers that on the 8th day of March, 1923, the plaintiff caused to be sent to the said John W. Weeks, as Secretary of War, a communication in reply as follows:

March 8, 1923.

To the Honorable the Secretary of War,
Washington, D. C.

Sir: On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately

deliver possession of said towboats and barges and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

This notice was served upon me while I was in Washington on other business and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request.

Very respectfully yours,

Edward F. Goltra.

Plaintiff avers that following the delivery of said communications, to wit, after the 8th day of March, 1923, the said three defendants made the threats of seizure vi et arms aforesaid, and caused said seizure to be attempted and begun.

Plaintiff further avers that the United States, acting through its lawfully authorized representatives, has not at any time fulfilled the said two contracts of May 28, 1919, and May 27, 1921, by putting the plaintiff into a position or allowing him to take a position where he could carry out the conditions of said contracts, either as a common carrier or as a private carrier under said contract as defined in section 2 (a) of the original contract of May 28, 1919. But, on the contrary, the said defendant John W. Weeks, acting therein as Secretary of War, as aforesaid, has arbitrarily, wrongfully and without authority of law prevented the plaintiff from using his boats and barges and unloading facilities as a common carrier, and has, on the other hand, prevented the plaintiff from other uses provided in said contract, as private carrier or otherwise, by rulings of said defendant and as Secretary of War, which made it impossible for the plaintiff to comply with said provisions of the said contracts. All of which conduct by said defendant, John W. Weeks, is and was beyond his authority as Secretary of War; was a usurpation and abuse of power; was in derogation of the rights of the plaintiff in law; was arbitrary, unreasonable, unjust, and against equity and good conscience. And the plaintiff avers that the acts of the defendant, John W. Weeks, and of the other defendants herein, as set forth in this bill in equity, are in

violation of Amendment V to the Constitution of the United States in that they are seeking to deprive and are about to deprive the plaintiff of his property without due process of law.

Plaintiff further avers that the said defendants and each and every of them, unlawfully combining and conspiring to deprive the plaintiff of his property without due process of law, as aforesaid, have already committed overt acts in pursuance of their said unlawful purpose in this, to wit, that on the 25th day of March, 1923, the same being Sunday, the said defendants, by their agents and servants, *vi et armis*, and with a great force of men acting with and for them, unlawfully and violently, and against the protests of the plaintiff, took forcible possession of a portion of said towboats and barges, described in said contracts, and then lying at the river bank within said City of St. Louis, and within said Eastern Division of the Eastern District of Missouri, and caused them to be hauled away from said bank by a towboat and removed from the City of St. Louis, and thus unlawfully took the same from the possession of plaintiff, but plaintiff avers on information and belief that said towboats and barges, so forcibly and unlawfully removed, are still within the jurisdiction of the District Court of the United States for the Eastern Division of Missouri.

And plaintiff further avers that at the time this bill is in course of preparation and presentation to the Judge of said United States District Court, to wit, on the afternoon of Sunday, March 25, 1923, the said defendants have been proceeding unlawfully and forcibly with a large number of men, as aforesaid, to take away from the possession of plaintiff

and to remove and cause to be removed from their said position at the river bank in St. Louis, all of the remaining towboats and barges mentioned in said contract which have not theretofore been unlawfully taken and removed; and the defendants are now still proceeding and threatening to forcibly remove all of the towboats, barges and other facilities for transportation mentioned in said contracts; and the said defendants will unlawfully deprive the plaintiff of all of his rights at law and in equity under said contracts, to the irreparable injury and damage of plaintiff, unless enjoined and restrained by this Honorable Court.

Wherefore, plaintiff prays for a temporary restraining order, to be granted immediately and without further notice to the said defendants, enjoining them from interfering with the possession of plaintiff of said boats and barges, requiring and enjoining and commanding them to return and cause to be returned to the possession of the plaintiff immediately at the place or places from which said towboats and barges and other facilities for transportation were taken and removed, all and singular, the said towboats, barges, and other facilities and appliances, pending the further orders of this Court, and enjoining the said defendants, and each of them, their assistants, inferior officers, agents, servants, and all persons acting by, through, or under them, in the doing any of the acts connected with the said taking of possession and removal of said towboats, barges, and other facilities for transportation; and further enjoining and commanding them to restore in all respects the statu quo ante, as of the time before any attempt to take possession as aforesaid was attempted,

and enjoining them to maintain such statu quo pending the further orders of this Court.

And plaintiff further prays that an order be made upon the said defendants, and each of them, requiring them, and each of them, to show cause on a day to be named therein pursuant to the Equity Rules why a temporary injunction should not be entered against them, and each of them, enjoining and restraining each and every and all of them from doing any of the acts herein made the subject of complaint until the full hearing of the cause herein, and especially enjoining and restraining until the further order of the Court the said John W. Weeks, purporting to act as Secretary of War of the United States, from doing any act whatsoever looking to the cancellation or other termination of the said Contract of May 28, 1919, and said supplemental contract of May 27, 1921, between the United States and said plaintiff; and especially enjoining and restraining until the further orders of the Court, the said Colonel T. Q. Ashburn, purporting to act as Chief of Inland and Coastwise Waterways Service of the United States, from doing any act whatsoever in aid of the declared purpose of said defendant John W. Weeks to terminate the said contracts, and enjoining and restraining him from further interfering in any way with the possession by plaintiff of said boats and barges; and especially enjoining said James M. Carroll, purporting to act as District Attorney of the United States, from doing any act or thing in furtherance of the plans of the said defendant John W. Weeks to terminate said contracts, or to interfere with the possession by plaintiff of said boats and barges and facilities of transportation.

And the plaintiff prays that on final hearing of this cause of action a decree may be entered in favor of the plaintiff and against the defendants, and each of them, which shall determine the rights of plaintiff as set forth herein under said contracts, and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

And may it please your Honors to grant unto your orators a writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said John W. Weeks, Secretary of War; Colonel T. Q. Ashburn, Chief of Inland Waterways and Coastwise Service, and James M. Carroll, District Attorney of the United States for the Eastern District of Missouri, commanding them and each of them on a certain day and under a certain penalty, in the said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, and further, to stand, to perform and abide such further orders, direction and decree therein, as to your Honors shall seem meet and shall be agreeable to equity and good conscience.

And plaintiff prays that he may have such other and further relief as the nature and circumstances of the case may require, and as to this Court shall seem just and equitable.

Edward F. Goltra,
Plaintiff.

By Jos. T. Davis,
Chas. Claflin Allen,
Douglas W. Robert,
Palmer, Davis & Scott, His Solicitors.
Of Counsel.

United States of America, } ss.
Eastern District of Missouri. }

Douglas W. Robert, being duly sworn, deposes and says that he is one of the solicitors for the plaintiff in the above-entitled cause, and is familiar with the foregoing bill of complaint, and knows the contents thereof; that the same is true to the knowledge of deponent except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Douglas W. Robert.

Subscribed and sworn to before me this twenty-fifth day of March, 1923.

My term expires Nov. 12th, 1926.

(Seal)

W. J. Robinson,
Notary Public.

A true copy.

C. B. Faris,

D. J.

EXHIBIT 2.

United States of America } ss.
Eastern District of Missouri }

In the District Court of the United States for the
Eastern Division of the Eastern Judicial
District of Missouri.

Edward F. Goltra,

Plaintiff.

vs.

John W. Weeks, Secretary of War
of the United States, Colonel
T. Q. Ashburn, Chief Inland and
Coastwise Waterways Service
of the United States, and James
E. Carroll, United States Dis-
trict Attorney,

Defendants.

Comes now the Attorney-General of the United States and suggests to this Honorable Court, and gives it to understand and be informed (appearing only for the purposes of this motion), that heretofore, while the United States of America was in a state of war with the Empire of Germany, and pursuant to the Acts of Congress legally enacted, the President of the United States delegated to the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation the power and authority vested in him under certain laws establishing, enlarging and maintaining the emergency shipping funds, the authority to enter into contracts for the construction of nineteen (19) river barges and of four (4) towboats intended for use on

the Mississippi River and its tributaries, and the said Fleet Corporation, in pursuance to said authority, transferred to the Chief of Engineers, United States Army, the sum of Three Million Eight Hundred Sixty Thousand Dollars (\$3,860,000.00), for the purpose of paying for said towboats and barges, and that thereafter, pursuant to such authority, the said barges were constructed and paid for out of the funds so appropriated, and thereafter, by executive order of the President of the United States, duly authorized, the said President of the United States did, on March 12, 1919, withdraw from the United States Shipping Board Emergency Fleet Corporation such part of the power and authority vested in him under said laws with reference to said barges and towboats, and did by said executive order delegate to the Secretary of War the power and authority so withdrawn from said United States Shipping Board and United States Shipping Board Emergency Fleet Corporation, with power and authority to said Secretary of War to deal with said barges by contract or otherwise, with reference to the operation, management and disposition of the same as in his judgment should be most economical and advantageous to the United States of America.

That in pursuance to the authority so delegated the contract set forth in extenso in complainant's bill of complaint was entered into; that in the securing of said contract, the said Edward F. Goltra represented to the United States of America and its officers that he had entered into various engagements and undertakings to increase the pig-iron supply as a war measure, and that he was, and had been for a long time, familiar with the uses and attempted develop-

ment of the towboats and barges on the Mississippi River, and was peculiarly qualified to put forward and complete the plans of the Government of the United States with respect to the development of river traffic on the Mississippi River and its tributaries, and, in reliance upon said representations of said Edward F. Goltra, the said contract and the supplementary contract set forth in the complainant's bill of complaint were entered into.

That thereafter construction and completion of said barges and towboats continued, and, in the course of time, were ready for delivery to the said Edward F. Goltra, pursuant to the terms and provisions of said contracts; that thereafter, from time to time, the said Edward F. Goltra was requested by the United States of America and its officers to receive said towboats and barges and to put them into operation, as was contemplated in the contracts aforesaid, and finally on June 30, 1922, the Secretary of War advised the complainant that he must take physical possession of the said fleet of towboats and barges on or before July 15, 1922, or the same would be delivered back to the Government of the United States.

That it was not until the said 15th day of July, 1922, that the complainant did take possession of said barges and towboats, as he was required to do under said contracts.

That it is provided in the said contract of May 28, 1919, that complainant should "operate as a common carrier the said fleet of three or four towboats and nineteen barges on the Mississippi River and its tributaries for the period of the lease, and of any renewals thereof," the period of said contract or lease under its terms beginning with the day of

the delivery of the first of said towboats to said complainant, to wit, on the 15th day of July, 1922.

That notwithstanding the provisions of said contract that said complainant should operate said **fleet** of towboats and barges as a common carrier, he has made no effort so to do, and has not from the time he obtained possession of said towboats and barges acted or served the public as therein provided; that he has made no effort to comply with the Shipping and Merchant Marine Act of 1920 with regard to common carriers; that he has failed to comply with the Shipping Act regarding common carriers; that he has made no effort to file, and has filed, no schedule of joint rail and water rates with the Interstate Commerce Commission, and has made no effort whatsoever to make arrangements with the railroads or other common carriers to secure such rates; that he has created no organization for the purpose of operating said fleet of towboats and barges as a common carrier, and has failed to perform any service of transportation whatsoever, except in one or two instances under special arrangements with private parties, and that these movements were of slight consequence and extent, but that practically all of the time since the complainant has had possession of said fleet of towboats and barges the same have remained idle and out of service; that suggestor is informed and states, upon information and belief, that only one of the towboats, since it has been in the possession of complainant, has been under steam, and that only in connection with the one or two movements heretofore referred to.

That the object and purpose of the United States of America in entering into the contract with the

complainant was to have the said barges and towboats used in commerce and transportation upon the Mississippi River and its tributaries to demonstrate the practicability and economy of such service and encourage and stimulate the use of such waters, and that that purpose has entirely failed to be accomplished by reason of the failure of the said complainant to take any steps or to make any effort whatsoever looking to the utilization of said fleet in such commerce and transportation.

That numerous complaints have been made by individual citizens and organizations of citizens in various cities served by the Mississippi River and its tributaries, with reference to the failure of said fleet to be used for the purposes of commerce and transportation upon said rivers; that suggestor states, upon information and belief, that there was and is great and constant need for the services of said fleet in connection with commerce and transportation along these waterways, and that there were ample opportunities open to the said complainant to have utilized said fleet for the purpose of transportation and commerce, but that he has utterly failed and neglected to avail himself of the opportunities so afforded, and has neglected and failed to put himself in a position to act as a common carrier, as was contemplated in the contracts hereinbefore referred to.

That the United States of America has operated and now operates a barge line known as the Mississippi-Warrior Service in the lower Mississippi River and its tributaries, and that in such service it has had opportunity to make use of the barges and towboats delivered to the complainant under the contracts

aforesaid, and, indeed, has had crying need for the same in order to take care of the business of transportation and commerce available to it, and has offered to pay the complainant fair and reasonable compensation and rates for the use of said barges and towboats, in order that instead of lying idle they might be utilized for the purpose of transportation and commerce, but that said complainant has refused to make any arrangements, or to permit the use of said towboats and barges, or any of them, in connection with such service, notwithstanding the fact that he himself was making no use of the same.

That instead of caring for and conserving the said towboats and barges, as required by the contracts aforementioned, the complainant has neglected to care for and conserve the same, and has permitted some of the said towboats and barges to suffer from exposure to the elements, and to be depreciated in value for service, and while not actually in service.

That in and by article 8 of said contract of May 28, 1919, it is provided that noncompliance with any of the terms or conditions of said contract would justify the termination of said contract and the returning of the fleet of barges and towboats to the United States, and that in pursuance to the terms and provisions of said contract, and of said article thereof, and because of the matters and things hereinbefore set forth, which the complainant neglected and failed to do, as he was obliged and bound to do under his contract aforesaid, the Secretary of War of the United States of America caused to be delivered to said complainant the notice dated March 3, 1923, set forth in subdivision 5 of the bill of complaint herein,

wherein and whereby said contract was terminated in accordance with the provisions and stipulations of the contract itself, and demand made upon the said complainant for the return of the said towboats and barges to the representatives of the United States of America, as in said notice designated; that thereafter, on March 8, 1923, complainant responded to said demand by his communication of that date set forth in subdivision 5 of the bill of complaint herein, wherein he declined and refused to return said towboats and barges as demanded.

That thereafter, to wit, on the 25th day of March, 1923, in pursuance of authority delegated to him by the Secretary of War of the United States, and pursuant to the terms of said contract, particularly article 8 thereof, the defendant, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States of America, an officer of the United States Army, acting under orders of the Secretary of War of the United States, took possession of the said fleet of towboats and barges on the Mississippi River, and, in so doing, acted entirely without force of any kind, in a peaceful and orderly manner, and without creating any disturbance or breach of the peace, and the United States now has full, complete and actual possession of said towboats and barges, and has so had such possession since the 25th day of March, 1923.

That on said 25th day of March, 1923, complainant presented to the Honorable Judge of this Court his verified bill of complaint which is now on file in this cause, and the Honorable Judge of this Court to

whom said bill of complaint was presented did thereupon undertake to make the following order in said cause:

“In the United States District Court, Eastern
Division of the Eastern Judicial
District of Missouri.

St. Louis, Mo., March 25, 1923.

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of
War of the United States,
Colonel T. Q. Ashburn, Chief
Inland and Coastwise Wa-
terways Service of the
United States, and James
E. Carroll, United States
District Attorney,

Defendant.

Now, on this day, the plaintiff presents his complaint, duly verified by affidavit, to Honorable Charles B. Faris, Judge of the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, in vacation, praying for an injunction restraining the defendants, Honorable John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James R. Carroll, United States District Attorney, their agents and servants, and anyone acting by or through or for them, from taking possession of and in anywise interfering with four power boats and

nineteen barges, now in the possession of the complainant, and restraining the said defendants, their agents and servants, and anyone acting by, through or for them, from taking possession of or interfering with the said boats and barges, and a mandatory injunction compelling the said defendants to restore to plaintiff all said boats and barges of which they have already taken possession; and it appearing from said complaint that the defendants, their agents and servants, have taken possession of said boats and one barge, and have now the same on the Mississippi River, within the jurisdiction of this Court; and it further appearing from said complaint that the defendants, their agents and servants are now endeavoring to take the remaining eighteen barges from the possession of the complainant, and to convey the same without the jurisdiction of this Court, and will so do unless restrained by order of this Court; and

It further appearing from the complaint that the plaintiff is in possession of said boats and barges under a contract with the Government of the United States, and if said boats and barges are taken from his possession by the defendants he will be deprived of his property without due process of law, in violation of the Constitution of the United States, and that he has no adequate remedy at law; and

It further appearing from the complaint that said acts of the defendants, their agents and servants, occurred on Sunday, March 25th 1923, on a day in which this Court is not in session, and if the defendants are not this day restrained from taking said boats and barges, they will convey them beyond the jurisdiction of this Court, before the Court can be convened; it is therefore

Ordered, that upon the plaintiff giving a penal bond in the sum of \$1,000.00, that the defendants John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James R. Carroll, United States District Attorney, their assistants, inferior officers, agents, servants and all persons acting by, through, for or under them, be and are hereby restrained from interfering with the possession of the plaintiff of said boats and barges and from taking any of them from his possession, and they are, and each of said defendants, their assistants, inferior officers, agents, servants and all persons acting by, through, for or under them, are further

Ordered to restore to the possession of the plaintiff all of said boats and barges, the possession of which they have already taken.

It Is Further Ordered that said defendants show cause in the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, on the 27th day of March, 1923, why a temporary injunction should not issue further restraining the defendants from doing said acts until the further order of said Court.

Given under my hand this, March 25, 1923.

(Signed)

C. B. Faris,

Judge of Said Court.

A true copy.

(Signed) C. B. Faris,

D. J."

Suggestor further shows to the Court that the order heretofore entered herein, enjoining the officer of the United States from taking possession of said

fleet and directing the return thereof to the plaintiff, was improvidently entered and should be set aside for that it was entered without notice and without a hearing thereon, and because the Court is without power or authority to proceed in invitum against the Government of the United States or its property, or its officers as such in possession thereof in relation thereto.

That the Government of the United States is a necessary and indispensable party to any suit seeking the relief as sought in the bill of complaint herein (if it could be impleaded as such) because of its ownership of, title to and possession of said towboats and barges, and as the only party to the contract which is sought to be interpreted and enforced by the bill of complaint herein, and for that reason also the officers of the said United States cannot be sued or enjoined, as is sought to be done in this proceeding.

That in making said order, particularly that portion thereof which required the defendants as officers of the United States to physically return the towboats and barges so taken to the complainant herein, the said Judge of this Honorable Court exceeded the power and authority and improvidently exercised the discretion conferred upon him, in that if said order were executed in respect to the physical return of said towboats and barges to the complainant the property rights and other rights of the United States of America would be unduly prejudiced and foreclosed against it; that said order of the Judge of this Honorable Court was made without notice to the defendants, and without any opportunity to be heard in defense of the action taken

in respect to the taking over of said towboats and barges, and if the order of this Honorable Court is executed in its entirety, and particularly in respect to the physical return of said towboats and barges to the complainant, the United States of America will be irremediably damaged and deprived of the possession of said towboats and barges lawfully acquired by it under the terms and conditions of said contract.

That the United States of America is the owner of the towboats and barges referred to in the contract of May 28, 1919, and that the possession of the complainant herein was only contingent, qualified and conditional upon the performance of the terms and conditions of said contract, and that the property rights of the United States of America are full and complete with respect to the said towboats and barges, by reason of its possession thereof and of the failure of the complainant, as hereinbefore alleged, to carry out and perform the terms and conditions of said contract.

That the complainant has threatened to and will, if permitted by this Honorable Court, pray citation for contempt against the defendant Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, for failure to comply with the terms of the order heretofore issued, and, if said citation for contempt is granted by this Honorable Court and a contempt adjudged against said defendant, he may be required to turn over to said complainant the physical possession of the said towboats and barges, and the property rights of the United States of America therein, and, what is more, the power to use the same in connection with trans-

portation and commerce on the Mississippi River and its tributaries will be cut off and the same be permitted to lie idle and unused in the hands of said complainant.

Wherefore, without submitting the rights of the Government of the United States of America to the jurisdiction of the Court, but respectfully insisting that the Court has no jurisdiction of the subject in controversy, he moves that the bill of complaint in this suit and the injunctive order of this Court be set aside, and all proceedings be quashed, stayed and dismissed, or, denying this, that the order of injunction herein be modified, particularly the mandatory part of said order requiring the physical return of said towboats and barges, or, denying that, that pending the determination of this controversy that a receiver be appointed for the said towboats and barges, with power and authority on the part of said receiver to operate the same in transportation and commerce on the Mississippi River and its tributaries, as contemplated in the contracts set forth in the bill of complaint, until the final order of this Court.

Harry M. Daugherty,
Attorney General of the United States
of America,
By Lon O. Hocker,
Special Assistant to the Attorney-General.

EXHIBIT NO. 3.

United States of America, } ss.
Eastern District of Missouri. }

In the District Court of the United States for the
Eastern Division of the Eastern Judicial Dis-
trict of Missouri.

Edward F. Goltra,

Plaintiff,

v.

John W. Weeks, Secretary of War
of the United States, Colonel
T. Q. Ashburn, Chief Inland
and Coastwise Waterways Serv-
ice of the United States, and
James E. Carroll, United States
District Attorney,

Defendants.

**Return of Colonel T. Q. Ashburn to Order to Show
Cause.**

Comes now defendant Colonel T. Q. Ashburn,
Chief Inland and Coastwise Waterways Service of
the United States, and, for his return to the order
to show cause herein why a temporary injunction
should not issue against him, states and shows to the
Court as follows, to wit:

That heretofore, while the United States of Amer-
ica was in a state of war with the Empire of Ger-
many, and pursuant to the acts of Congress legally
enacted, the President of the United States delegated
to the United States Shipping Board and the United

States Shipping Board Emergency Fleet Corporation the power and authority vested in him under certain laws establishing, enlarging and maintaining the emergency shipping funds, the authority to enter into contracts for the construction of nineteen (19) river barges and of four (4) towboats intended for use on the Mississippi River and its tributaries, and said Fleet Corporation, in pursuance to said authority, transferred to the Chief of Engineers, United States Army, the sum of three million eight hundred sixty thousand dollars (\$3,860,000.00), for the purpose of paying for said towboats and barges, and that thereafter, pursuant to such authority, the said barges were constructed and paid for out of the funds so appropriated, and thereafter, by executive order of the President of the United States, duly authorized, the said President of the United States did, on March 12, 1919, withdraw from the United States Shipping Board Emergency Fleet Corporation such part of the power and authority vested in him under said laws with reference to said barges and towboats, and did by said executive order delegate to the Secretary of War the power and authority so withdrawn from said United States Shipping Board and United States Shipping Board Emergency Fleet Corporation, with power and authority to said Secretary of War to deal with said barges by contract or otherwise, with reference to the operation, management and disposition of the same as in his judgment should be most economical and advantageous to the United States of America.

That in pursuant to the authority so delegated the contract set forth in extenso in complainant's

bill of complaint was entered into; that in the securing of the said contract the said Edward F. Goltra represented to the United States of America and its officers that he had entered into various engagements and undertakings to increase the pig-iron supply as a war measure, and that he was, and had been for a long time, familiar with the uses and attempted development of the towboats and barges on the Mississippi River, and was peculiarly qualified to put forward and complete the plans of the Government of the United States with respect to the development of river traffic on the Mississippi River and its tributaries, and, in reliance upon said representations of said Edward F. Goltra, the said contract and the supplementary contract set forth in the complainant's bill of complaint were entered into.

That thereafter construction and completion of said barges and towboats continued, and, in the course of time, were ready for delivery to the said Edward F. Goltra, pursuant to the terms and provisions of said contracts; that thereafter, from time to time, the said Edward F. Goltra was requested by the United States of America and its officers to receive said towboats and barges and to put them into operation, as was contemplated in the contracts aforesaid, and finally, on June 30, 1922, the Secretary of War advised the complainant that he must take physical possession of the said fleet of towboats and barges on or before July 15, 1922, or the same would be delivered back to the Government of the United States. That it was not until the said 15th day of July, 1922, that the complainant did take possession of said barges and towboats, as he was required to do under said contracts.

That it is provided in the said contract of May 28, 1919, that complainant should "operate as a common carrier the said fleet of three or four towboats and nineteen barges on the Mississippi River and its tributaries for the period of the lease, and of any renewals thereof," the period of said contract or lease under its terms beginning with the day of the delivery of the first of said towboats to said complainant, to wit, on the 15th day of July, 1922.

That notwithstanding the provisions of said contract that said complainant should operate said fleet of towboats and barges as a common carrier, he has made no effort so to do, and has not from the time he obtained possession of said towboats and barges acted or served the public as therein provided; that he has made no effort to comply with the Shipping and Merchant Marine Act of 1920 with regard to common carriers; that he has failed to comply with the Shipping Act regarding common carriers; that he has made no effort to file, and has filed, no schedule of joint rail and water rates with the Interstate Commerce Commission, and has made no effort whatsoever to make arrangements with the railroads or other common carriers to secure such rates; that he has created no organization for the purpose of operating said fleet of towboats and barges as a common carrier, and has failed to perform any service of transportation whatsoever, except in one or two instances under special arrangements with private parties, and that these movements were of slight consequence and extent, but that practically all of the time since the complainant has had possession of said fleet of towboats and barges the same have remained

idle and out of service; that this defendant is informed and states, upon information and belief, that only one of the towboats, since it has been in the possession of complainant, has been under steam, and that only in connection with the one or two movements heretofore referred to.

That the object and purpose of the United States of America in entering into the contract with the complainant was to have the said barges and towboats used in commerce and transportation upon the Mississippi River and its tributaries to demonstrate the practicability and economy of such service and encourage and stimulate the use of such waters, and that that purpose has entirely failed to be accomplished by reason of the failure of the said complainant to take any steps or to make any effort whatsoever looking to the utilization of said fleet in such commerce and transportation.

That numerous complaints have been made by individual citizens and organizations of citizens in various cities served by the Mississippi River and its tributaries, with reference to the failure of said fleet to be used for the purposes of commerce and transportation upon said rivers; that this defendant states, upon information and belief, that there was and is great and constant need for the services of said fleet in connection with commerce and transportation along these waterways, and that there were ample opportunities open to the said complainant to have utilized said fleet for the purpose of transportation and commerce, but that he has utterly failed and neglected to avail himself of the opportunities so afforded, and has neglected and failed to put himself

in a position to act as a common carrier, as was contemplated in the contracts hereinbefore referred to.

That the United States of America has operated and now operates a barge line known as the Mississippi-Warrior Service in the lower Mississippi River and its tributaries, and that in such service it has had opportunity to make use of the barges and towboats delivered to the complainant under the contracts aforesaid, and, indeed, has had crying need for the same in order to take care of the business of transportation and commerce available to it, and has offered to pay the complainant fair and reasonable compensation and rates for the use of said barges and towboats, in order that instead of lying idle they might be utilized for the purpose of transportation and commerce, but that said complainant has refused to make any arrangements, or to permit the use of said towboats and barges, or any of them, in connection with such service, notwithstanding the fact that he himself was making no use of the same.

That instead of caring for and conserving the said towboats and barges, as required by the contracts aforementioned, the complainant has neglected to care for and conserve the same, and has permitted exposure to the elements, and to be depreciated in some of the said towboats and barges to suffer from value for service, and while not actually in service.

That in and by article 8 of said contract of May 28, 1919, it is provided that noncompliance with any of the terms or conditions of said contract would justify the termination of said contract and the returning of the fleet of barges and towboats to the United States, and that in pursuance to the terms and provisions

of said contract, and of said article thereof, and because of the matters and things hereinbefore set forth, which the complainant neglected and failed to do, as he was obliged and bound to do under his contract aforesaid, the Secretary of War of the United States of America caused to be delivered to said complainant the notice dated March 3, 1923, set forth in subdivision 5 of the bill of complaint herein, wherein and whereby said contract was terminated in accordance with the provisions and stipulations of the contract itself, and demand made upon the said complainant for the return of the said towboats and barges to the representatives of the United States of America, as in said notice designated; that thereafter, on March 8, 1923, complainant responded to said demand by his communication of that date set forth in subdivision 5 of the bill of complaint herein, wherein he declined and refused to return said towboats and barges as demanded.

That thereafter, to wit, on the 25th day of March, 1923, in pursuance of authority delegated to him by the Secretary of War of the United States, and pursuant to the terms of said contract, particularly article 8 thereof, the defendant Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States of America, an officer of the United States Army, acting under orders of the Secretary of War of the United States, took possession of the said fleet of towboats and barges on the Mississippi River, and, in so doing, acted entirely without force of any kind, in a peaceful and orderly manner, and without creating any disturbance or breach of the peace, and the United States now has full, complete

and actual possession of said towboats and barges, and has so had such possession since the 25th day of March, 1923.

That on the 25th day of March, 1923, complainant presented to the Honorable Judge of this court his verified bill of complaint which is now on file in this cause, and the Honorable Judge of this court, to whom said bill of complaint was presented, did thereupon make and enter of record an order in said cause enjoining the defendants from interfering with the possession by the complainant of the said towboats and barges, and from taking any of them from the possession of the complainant, and requiring them to restore to the possession of the complainant all of said towboats and barges of which possession had been taken.

That thereafter the Honorable Judge of this court entered a further order directing this defendant to return to the jurisdiction of this Court, on or before the 21st day of April, 1923; said towboats and barges, or to show cause on said date why he should not be punished for contempt for failing so to do.

This defendant further states and shows to the Court that in compliance with said order he has made arrangements and will cause the return of said towboats and barges into the jurisdiction of this Court within the time provided in said last-named order.

This defendant further respectfully shows to the Court that the order first herein entered enjoining him as an officer of the United States from taking possession of said towboats and barges, and that the suit set forth in the bill of complaint herein, upon which said order was made, is, in purpose and effect,

a proceeding and order against the Government of the United States, and its property; that the Government of the United States is a necessary and indispensable party to any suit seeking the relief as sought in the bill of complaint herein (if it could be impleaded as such) because of its ownership of, title to, and possession of said towboats and barges, and as the only party to the contract which is sought to be interpreted and enforced by the bill of complaint herein, and, for that reason, this defendant respectfully states that this proceeding and the injunctive order of this Honorable Court is without **jurisdiction** and null and void; that in and by this proceeding the property rights and other rights of the United States of America are being sought to be adjudicated and foreclosed against it, although the said United States of America is not a nominal party to the proceeding and cannot be made a party to this proceeding without its consent; that the United States of America is the owner of the towboats and barges referred to in the contract of May 28, 1919, and described in the bill of complaint herein, and that the possession of the complainant herein was only contingent, qualified and conditional upon the performance of the terms and conditions of said contract, and that the property rights of the United States of America are full and complete with respect to the said towboats and barges, by reason of its ownership and possession thereof, and of the failure of complainant, as hereinbefore alleged, to carry out and perform the terms and conditions of said contract.

This defendant further states that he has no interest in the said towboats and barges, either as an individual or as an officer of the United States, ex-

cept as such officer to carry out the orders and instructions of his superiors with respect thereof; that the bill of complaint does not undertake to sue him as an individual, nor does the order of this Court undertake to restrain him from acting as an individual, but only in respect of his capacity as a representative of one of the departments of the United States of America, and that this suit, while not nominally against the United States, is in its essence, effect and consequence a suit or proceeding against the said United States, and, for that reason, all proceedings herein should be quashed and for naught held.

This defendant further shows that this proceeding is a proceeding in equity, the purpose of which, on the part of complainant, is to retake possession of the personal property, and that the complainant had a complete and adequate remedy at law for the determination of his rights in connection with such taking, if the same was in anywise unlawful, which this defendant denies.

Wherefore, this defendant prays that he be discharged from the rule to show cause herein; that this proceeding be dismissed as being one brought against the United States, and that the injunctive order herein be recalled and the same for naught held, and that this defendant be permitted to continue to hold said towboats and barges, and to retain possession thereof, as heretofore acquired by him.

(Signed) T. Q. Ashburn.

State of Missouri, }
City of St. Louis. } ss

T. Q. Ashburn, defendant in the above-entitled cause, being first duly sworn, upon his oath states that he has read the above and foregoing return to the order to show cause herein, and that the facts therein stated are true.

(Signed) T. Q. Ashburn.

Subscribed and sworn to before me, a notary public, within and for the City of St. Louis, State of Missouri, this 14th day of April, 1923.

My commission expires September 20, 1924.

(Signed) G. W. Huth,
Notary Public.

(Seal)

Filed April 14, 1923.

EXHIBIT NO. 4.

United States of America,
Eastern District of Missouri, ss:

In the District Court of the United States for the
Eastern Division of the Eastern Judicial District
of Missouri.

Edward F. Goltra,
v. Plaintiff,

John W. Weeks, Secretary of War
of the United States, Colonel T.
Q. Ashburn, Chief Inland and
Coastwise Waterways Service of
the United States, and James E.
Carroll, United States District
Attorney,

Defendants.

**Return of Defendant, John W. Weeks, Secretary of
War of the United States.**

Comes now defendant, John W. Weeks, Secretary
of War of the United States of America, and, volun-
tarily entering his appearance herein, and for his
return to the order to show cause herein why a tem-
porary injunction should not issue against him,
adopts the return of the defendant, Col. T. Q. Ash-
burn, Chief Inland and Coastwise Waterways Service
of the United States, and prays that the Court accept
said return as and for his return to the said order to
show cause.

Lon O. Hocker,
Solicitor for said Defendant.

Filed April 17, 1923.

EXHIBIT NO. 5.

United States of America,
Eastern District of Missouri, ss.

In the District Court of the United States for the
Eastern Division of the Eastern Judicial District
of Missouri.

Edward F. Goltra,

Plaintiff,

v.

John W. Weeks, Secretary of War
of the United States, Colonel T.
Q. Ashburn, Chief Inland and
Coastwise Waterways Service of
the United States, and James
E. Carroll, United States Dis-
trict Attorney,

Defendants.

Application to Dismiss Proceedings.

Come now the defendants herein and pray the Court to dismiss this proceeding and to quash the temporary restraining order heretofore issued for the following reasons, to wit:

That the bill of complaint herein, while nominally filed against the defendants named therein, is, in its essence, purpose and effect, a proceeding against the Government of the United States and its property; that the said Government is a necessary and indispensable party to any suit seeking the relief as sought in the bill of complaint herein (if it could be impleaded as such) because of its ownership of,

title to, and possession of, said towboats and barges and as the only real party (other than the complainant) to the contract which is sought to be interpreted and specifically enforced by the bill of complaint herein, and for this reason this proceeding and the injunctive order of this Honorable Court is without its jurisdiction and null and void; that in and by this proceeding the property rights and other rights of the United States of America are being sought to be adjudicated and foerclosed against it, although the said United States of America is not a nominal party to the proceeding and can not be made a party to this proceeding; that the United States of America is the owner of the towboats and barges referred to in the contract of May 28, 1919, and described in the bill of complaint herein; that the possession of the complainant herein was only contingent, qualified and conditional upon the performance of the terms and conditions of said contract, and that the property rights of the said United States are full and complete with respect to said towboats and barges by reason of its ownership and possession thereof; that these defendants, either as individuals or as officers of the United States, have no interest in the said towboats and barges, and, indeed, the bill of complaint does not proceed against them as individuals, but only in respect of their capacity as representatives of the United States of America, and that, therefore, this suit, while not nominally against the United States, is, in its essence, effect, and consequence, a suit against the said United States, and for that reason all proceedings should be quashed and for naugh held; that this is a proceeding in

equity, the purpose of which, on the part of the complainant, as shown by the bill of complaint, is to retake possession of personal property, and that complainant has a complete and adequate remedy at law for the determination of his rights in connection with the original taking, if the same was in any wise unlawful.

Wherefore, these defendants pray that the bill of complaint herein be dismissed and that the restraining order heretofore issued be quashed, recalled and for naught held.

Lon O. Hocker,
Solicitor for Defendants.

Filed April 17, 1923.

EXHIBIT NO. 6.

War Department,
Office of the Engineers,
Washington, April 27, 1923.

E. F. Goltra, Esq.,

La Salle Building, St. Louis, Missouri.

Sir: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.

I, therefore, declare the said contract and the supplement thereto, terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession to the United States of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States.

Yours very truly,

(Signed) Lansing H. Beach,
Major General, Chief of Engineers.

EXHIBIT 7.

United States of America,
Eastern Division of the Eastern } ss.
Judicial District of Missouri.

In the District Court of the United States, in and for
the Eastern Division of said Judicial District.

Be it Remembered, That at a regular stated term
of the District Court of the United States, in and for
said Eastern Division of the Eastern Judicial Dis-
trict of Missouri, begun and holden at the City of St.
Louis, on the third Monday, the 19th day of March,
in the year of our Lord, nineteen hundred and twenty-
three, the following among other proceedings were
had, and appear of record on Monday, the 26th day of
March, A. D. 1923, to wit:

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of War
of the United States, et al.
Defendants.

6339

The plaintiff in the above-entitled cause having
under date of Sunday, March 25th, 1923, presented to
and had filed by the Judge of this Court under said
date his bill of complaint:

Now on this 26th day of March, 1923, a subpoena
in chancery is issued to defendants, returnable April
14th, 1923.

And thereafter, to wit, on said date, March 26th,
1923, the following among other proceedings were

had and appear on file and of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of War
of the United States, Colonel T.
Q. Ashburn, Chief Inland and
Coastwise Waterways Service of
the United States, and James R.
Carroll, United States District
Attorney,

Defendants.

6339.

Now, on this day, the plaintiff presents his complaint, duly verified by affidavit, to Honorable Charles B. Faris, Judge of the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, in vacation, praying for an injunction restraining the defendants, Honorable John W. Weeks, Secretary of War of the United States; Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James R. Carroll, United States District Attorney, their agents and servants and anyone acting by or through or for them, from taking possession of and in anywise interfering with four power boats and nineteen barges, now in the possession of the complainant, and restraining the said defendants, their agents and servants and anyone acting by, through or for them, from taking possession of or interfering with the said boats and barges, and a mandatory injunction compelling the said defendants to restore to plaintiff all said boats and barges of which they have already

taken possession; and it appearing from said complaint that the defendants, their agents and servants, have taken possession of said boats and one barge, and have now the same on the Mississippi River, within the jurisdiction of this Court, and it further appearing from said complaint that the defendants, their agents and servants, are now endeavoring to take the remaining eighteen barges from the possession of the complainant, and to convey the same without the jurisdiction of this Court, and will so do unless restrained by order of this Court, and

It further appearing from the complaint that the plaintiff is in possession of said boats and barges under a contract with the Government of the United States, and if said boats and barges are taken from his possession by the defendants he will be deprived of his property without due process of law, in violation of the Constitution of the United States, and that he has no adequate remedy at law, and

It further appearing from the complaint that said acts of the defendants, their agents and servants, occurred on Sunday, March 25th, 1923, on a day in which this court is not in session, and if the defendants are not this day restrained from taking said boats and barges, they will convey them beyond the jurisdiction of this Court, before the Court can be convened, it is, therefore,

Ordered, that upon the plaintiff giving a penal bond in the sum of \$1,000, that the defendants, John W. Weeks, Secretary of War of the United States; Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James R. Carroll, United States District Attorney, their assistants, inferior officers, agents, servants and all per-

sons acting by, through, for or under them, be and are hereby restrained from interfering with the possession of the plaintiff of said boats and barges, and from taking any of them from his possession, and they are and each of said defendants, their assistants, inferior officers, agents, servants and all persons acting by, through, for or under them, are further

Ordered to restore to the possession of the plaintiff all of said boats and barges, the possession of which they have already taken.

It Is Further Ordered that said defendants show cause in the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, on the 27th day of March, 1923, why a temporary injunction should not issue further restraining the defendants from doing said acts until the further order of said Court.

Given under my hand this March 25, 1923, at 8 o'clock a. m.

(Signed) C. B. Faris,
Judge of said Court.

Bond of plaintiff on temporary restraining order approved and filed.

Note: Above order allowed, filed and entered as of March 25th, 1923, at 8 o'clock a. m. of said date.

And thereafter, to wit, on March 27th, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	} Plaintiff,	No. 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al.,		
	Defendants.	

Now on this day comes plaintiff in the above-entitled cause by his attorney, and comes also defendant James E. Carroll, per se, whereupon on application of said defendant James E. Carroll it is

Ordered, That he be and is hereby granted to April 3rd, 1923, at 10 o'clock a. m., within which to file his return to the order to show cause heretofore issued herein.

It is Further Ordered that the temporary restraining order herein, as well as the bond of plaintiff given in connection therewith, be and they each are hereby continued in force and effect to said April 3rd, 1923, at 10 o'clock a. m.

(Signd) C. B. Faris,
District Judge.

And thereafter, to wit, on April 3rd, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	} Plaintiff,	No. 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al.,		
	Defendants.	

Now on this day comes plaintiff in the above-entitled cause by his solicitors, and comes also Lon

O. Hocker, Esq., and enters his appearance herein as solicitor for defendant, James E. Carroll, United States District Attorney for the Eastern Division of the Eastern Judicial District of Missouri.

And now said defendant, James E. Carroll, Esq., etc., files herein his return to the order to show cause heretofore issued.

And now said Lon O. Hocker, Esq., enters a restricted appearance for defendant T. Q. Ashburn, etc., and files in behalf of said defendant a motion to quash the return of service of the United States Marshal, as well as a plea to the jurisdiction of the court in this cause, which said motion to quash and plea to the jurisdiction are by the Court set for hearing on April 7th, 1923, at 10 o'clock a. m.

It is by the Court further Ordered that the temporary restraining order, as well as the order supplemental thereto, be and they each are hereby continued in force and effect to said April 7th, 1923.

And thereafter, to wit, on April 6th, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of War
of the United States, et al.,
Defendants.

No. 6339.

Now on this day comes the Attorney-General of the United States of America, and files herein his

joint motion and suggestions in the above-entitled cause.

And thereafter, to wit, on April 7th, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures, as follows, to wit:

Edward F. Goltra,	Plaintiff,	} 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al., Defendants.		

Now at this day comes the plaintiff by his solicitors; Joseph T. Davis, Charles Claflin Allen and Douglas W. Robert; and comes also the defendant, James E. Carroll, appearing by his solicitor, Lon O. Hoeker; and comes also the defendant, T. Q. Ashburn, appearing specially by his solicitor, Lon O. Hoeker, in his motion to quash the returns of the marshal herein; and the Court having duly considered the said motion to quash, and the said returns of the marshal, and having heard evidence thereon, and being now fully advised of and concerning the premises; it is now

Ordered by the Court that said motion to quash is overruled; and it appearing to the Court that no return has been filed herein and that the said T. Q. Ashburn had not complied in any respect with the temporary restraining order heretofore issued in this cause, to wit, on the 25th day of March, 1923, which said order was continued in force until the 3rd day of April, 1923, and on said date was continued in force until the 7th day of April, 1923, it is further

Ordered by the Court that a rule now issue directing said defendant T. Q. Ashburn to return the boats and barges mentioned and described in said original order of March 25th, 1923, into the jurisdiction of this Court at the Port of St. Louis, Missouri, on or before April 21st, 1923, or, failing herein to show cause on the said 21st day of April, 1923, at 10 o'clock a. m. of said day, why he should not be punished for contempt of this Court, and in the meanwhile the said temporary restraining order and the bond given therein are continued in full force and effect.

(Signed) C. B. Faris,
Judge.

And thereafter, to wit, on April 14th, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of War
of the United States, et al.,
Defendants.

6339.

Now on this day comes defendant Colonel T. Q. Ashburn, etc., and by leave of Court files herein his return to the order to show cause heretofore issued in this cause.

And thereafter, to wit, on April 17th, 1923, the following among other proceedings were had and ap-

pear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	Plaintiff,	} 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al., Defendants.		

Now on this day comes defendant John W. Weeks, Secretary of War of the United States, and files herein his return to the order to show cause heretofore issued in this cause.

And now said defendants file herein their joint motion to dissolve the temporary restraining order heretofore granted, as well as to dismiss this cause.

And thereafter, to wit, on April 21st, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	Plaintiff,	} 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al., Defendants.		

Now on this day come the parties in the above-entitled cause, by their respective solicitors, and argue and submit to the Court the joint motion of defendants to dismiss this cause.

It is now ordered by the Court that the temporary restraining order heretofore granted in this cause, as well as the bond given in connection therewith, be and they each are hereby continued in force and effect to the further order of the Court.

And, thereafter, to wit, on April 30th, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	Plaintiff,	} 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al., Defendants.		

Now on this day the Court having considered the joint motion of defendants to dismiss this cause, being fully advised in the premises, doth

Order that said joint motion to dismiss be and it is hereby overruled. (Oral opinion.)

And, thereafter, to wit, on May 1st, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	Plaintiff,	} 6339.
vs.		
John W. Weeks, Secretary of War of the United States, et al., Defendants.		

Now on this day, upon application of defendants, it is ordered that they be and are hereby granted four days from this date within which to plead herein.

And thereafter, to wit, on May 4th, 1923, the following among other proceedings were had and appear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,	Plaintiff,	} 6339
vs.		
John W. Weeks, Secretary of War of the United States, et al., Defendants.		

Now on this day comes plaintiff in the above-entitled cause and by leave of Court files herein his motion for a rule on defendant Colonel T. Q. Ashburn, etc., to compel said defendant to comply with the mandatory provisions of the temporary restraining order, etc., heretofore granted in this cause. And it is now

Ordered, That the hearing on said motion of plaintiff be and it is hereby deferred to May 10th, 1923.

And thereafter, to wit, on May 10th, 1923, the following among other proceedings were had and ap-

pear of record in said cause, in words and figures as follows, to wit:

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of War
of the United States, et al.,
Defendants.

6339

Now on this day upon application of defendants it is Ordered that they be and are hereby granted to June 15th, 1923, within which to plead.

It is further Ordered that the temporary restraining order, as well as all other orders heretofore entered herein, be and they each are hereby continued in force and effect to the further order of the Court. United States of America,

Eastern Division of the Eastern Judicial District of
of Missouri, ss:

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a true copy of all proceedings under dates of March 26th, March 27th, April 3rd, April 6th, April 7th, April 14th, April 17th, April 21st, April 30th, May 1st, May 4th and May 10th, 1923, in case No. 6339 of

Edward F. Goltra,

Plaintiff,

vs.

John W. Weeks, Secretary of War
War of the United States,
Colonel T. Q. Asburn, Chief
Inland and Coastwise Water-
ways Service of the United
States, and James E. Carroll,
United States District At-
torney,

Defendants.

as fully as the same remain on file and of record in
said case in my office.

In witness whereof, I hereunto subscribe my name
and affix the seal of said court, at office in the City
of St. Louis, in the Eastern Division of said Dis-
trict, this 16th day of May, in the year of our Lord
nineteen hundred and twenty-three.

(Seal of the United)
(States District Court)

Jas. J. O'Connor,
Clerk of said Court.
By O. W. McAuliff,
Deputy.

SUPREME COURT OF THE UNITED STATES

DOCKETED

**In the Matter of the PETITION of THE
UNITED STATES OF AMERICA, AS
OWNER OF NINETEEN BARGES AND
FOUR TUGBOATS**

**SUGGESTION IN SUPPORT OF PRISON
FOR VIOLATION OF PROHIBITION**

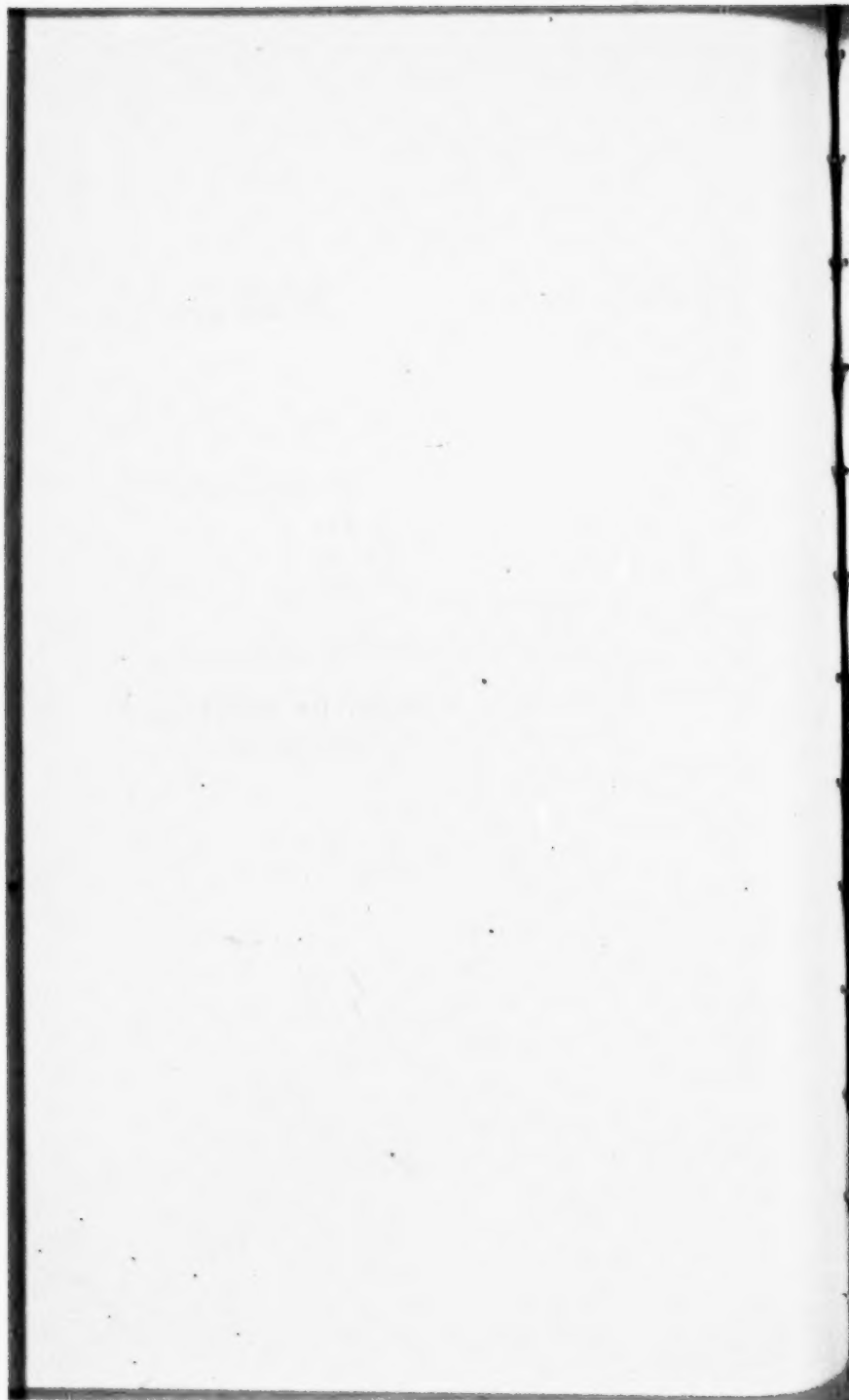
HARRY W. BANGHEAT,
Attorney General for the United States of
America.

JAMES W. BECK,
Solicitor General of the United States.

LON O. ROCKER,
Special Assistant Attorney General for the
United States.

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1922.

In the Matter of the PETITION OF THE
UNITED STATES OF AMERICA, AS
OWNER OF NINETEEN BARGES AND
FOUR TOWBOATS. }

**SUGGESTIONS IN SUPPORT OF PETITION
FOR WRIT OF PROHIBITION.**

STATEMENT.

The suit sought to be prohibited by this proceeding is one brought by Edward F. Goltra in the District Court of the United States for the Eastern District of Missouri against John W. Weeks, Secretary of War; Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney for that district.

Prior to May 28, 1919, the date of the contract in controversy, the United States Shipping Board Emergency Fleet Corporation had allotted, out of funds appropriated to it by the government, to the Chief of Engineers of the United States Army, three million eight hundred sixty thousand dollars (\$3,860,000.00) for a fleet of four towboats and nineteen barges, for the primary purpose of transporting iron and coal to and from St. Louis, Missouri, as an emergency of war then existing. Contracts were let with private parties for the construction of the fleet. Upon the signing of the armistice the emergency passed, at which time the barges were nearing completion, and, in order to utilize them, the boats and barges were let by the contract in controversy to the complainant Goltra. This contract is set out in extenso in the bill of complaint which forms a part of this record.

The contract is stated therein to be "between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War," and Edward F. Goltra, of the City of St. Louis. The contract thereupon sets out certain previous relations between the parties, the allotment of the \$3,860,000.00 for the construction of the towboats and barges, the letting of the contracts for the construction of the barges, the construction of the towboats for the uti-

lization of the barges, and the passing of the emergency of war. The contract thereupon recites that the lessor charters and leases to the lessee the said boats and barges for a term of five (5) years after the delivery of the first barge or towboat to the complainant. One of the stipulations of the contract is "that the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron, ore, coal and other commodities"; that the lessee shall pay all operating expenses and maintain the fleet in good operating condition and provide insurance for the benefit of the United States. Various other provisions for the protection of the United States are contained in the lease which are not necessary to the consideration of the question here presented.

The contract provides that the net earnings, after deducting operating expenses and maintenance, shall be deposited with the Treasurer of the United States to the credit of the Secretary of War until such time as the net earnings shall equal the full amount of the cost of the vessels, plus interest at 4 per cent.

Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if desired by the lessee, a board of arbitrators to be selected by the parties shall appraise the value of the

fleet, and the lessee is given the **right** or option of purchasing the fleet, with respect to which purchase it is provided that if the sums deposited with the Treasurer by the lessee shall equal the full amount of the cost of the vessels, plus interest, the same shall be applied as payment in full for the fleet; any earnings above that amount to belong to the lessee. If the funds are not equal to the cost, plus interest, but are greater than the appraised value, the whole funds shall belong to the United States and the fleet shall thereupon become the property of the lessee. If the funds are less than the appraised value they shall be applied to the purchase price at the appraised value and the deficiency paid by the lessee to the United States, in which event the fleet is to be his property. In the event that the funds are unequal to the appraised value, the deficiency payments are to be made by the lessee over a period of fifteen (15) years in equal installments, with interest, the title to the property remaining in the United States until the payment of the whole purchase price.

Section 8 of the contract is as follows:

“The lessor reserves the right to inspect the plant, fleet and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; and non-

compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

On May 15, 1922, the complainant took possession of the boats under the contract.

On March 3, 1923, the Secretary of War served notice upon the complainant that, in his judgment, the complainant had not complied with the terms and conditions of the contract, in that he had failed to operate the towboats and barges as a common carrier, declaring that the contract and the supplement thereto were terminated, and demanding the delivery of the possession of the towboats and barges to the United States. A similar notice (in view of the contention of the complainant that the Chief of Engineers, and not the Secretary of War, had the right to terminate the contract) was signed by Lansing F. Beach, Chief of Engineers, on April 27, 1923, and delivered to Mr. Goltra on April 30, 1923.

On March 25, 1923, the defendant Ashburn, pursuant to instructions from the Secretary of War, took possession of the towboats and barges; as he contends, without violence or show of force, but as com-

plainant contends otherwise. On the same day the bill of complaint was presented to the Hon. C. B. Faris, Judge of the Eastern District of Missouri, and the mandatory and restraining order, set forth in the record herein, was issued and served upon Colonel Ashburn and Mr. Carroll. This order restrained the defendants from interfering with the possession of the complainant and commanded the return of the boats already taken.

Afterwards the appearance of the Secretary of War was entered in the cause.

At all stages of the proceeding the defendants, by motion to dismiss and otherwise, asserted that this proceeding was, in essence and effect, although not nominally, a suit against the United States and its property. The pleadings raising these questions are set forth in the record filed herewith. This contention was denied by the District Court and the motion to dismiss overruled. A stay of proceedings has been allowed in order to permit the presentation of this petition to this Court.

I.

RIGHT TO PROHIBITION.

We shall hereinafter undertake to satisfy the Court that if the suit in controversy is in essence and effect one against the United States, then the District

Court of the United States is without jurisdiction, and prohibition will lie. Thereafter we hope to demonstrate that the suit is in effect a suit against the United States.

It may be said that in view of the right to appeal or in error, the discretion of the Court should be exercised against the writ. Granting the existence of the right of final review, we say that the right is inadequate to the needs of the situation as here presented, which, with accompanying lack of jurisdiction in the court below, clearly justifies the writ.

The situation brought about by the institution of the suit and the mandatory injunction issued in connection therewith, is such that prohibition is the only remedy which can afford practical relief. The nineteen (19) barges and four (4) towboats which are the subject matter of this controversy are without doubt the property of the United States. They were built at an expense of approximately three million eight hundred thousand dollars (\$3,800,000.00), all moneys of the United States. They are capable of being used in connection with commerce and transportation upon the Mississippi River, and their construction was initiated and completed with that very purpose in view. The contract in question was expressly made in furtherance of that purpose, and the action taken by the officers of the United States, authorized by the

contract itself, was taken because of complainant's failure to attempt to carry out this purpose.

While the boats are still in the possession of the officers of the United States, they are, under the orders of the District Court, being held in harbor within the jurisdiction of that court, and so are incapable of being used in commerce and transportation. A motion is pending to require the return of the boats to complainant.

The litigation with respect to the right to cancel the contract with Goltra, unless disposed of in this proceeding, will undoubtedly be carried to the court of final resort by whichever party may lose in the courts below. In the meantime, any possession of the boats, either by the United States or by the complainant, will be subjected to the vicissitudes of the litigation, and at any stage of the proceeding their possession may be taken from one party and transferred to the other, as the particular Court dealing with the situation may view the right of the controversy.

The character of the use to which the boats are susceptible is such that no practical service can be furnished by them unless the party holding possession has the unquestioned and uninterrupted right of possession. If the possession is for the time being left in the United States, it, in order to advantageously use the boats, must enter into contracts with

shippers looking to their future use, the performance of which contracts may be jeopardized by the loss of that possession and consequent liability for damages to be adjudged in the Court of Claims as for breach of contract.

The same is true with respect to the possession by Mr. Goltra. He would be at all times, until the end of this litigation, in the position of one holding property which could not be adequately and serviceably used. In order to use this property as a common carrier he would have to comply with the regulations of the Interstate Commerce Commission and with the Shipping Act, and be prepared to perform the contracts and the service which he is permitted to make and render. Therefore, so long as this litigation is pending and undetermined, the use of this valuable property, in which the public is interested from the standpoint of service and the Government from that of revenue, is entirely destroyed, no matter in whose possession it may temporarily be placed, the property itself being affected also by the depreciation and injury incident to nonuse. For these reasons we say that there is **no adequate remedy** by appeal, or error, or certiorari, as the very prolongation of the litigation tends to the destruction of its subject matter.

The situation apparent here, resulting in the tying up of the boats, the consequent loss to the United States of revenues from use, and of the loss to the public in the deprivation of the service which they might render, is such that the discretion of the Court, if the view obtains that the right is discretionary and not absolute, ought to be exercised favorably to the writ.

Recurring to our first proposition, we say that if the suit is in essence and effect one against the United States, then the District Court is without jurisdiction and prohibition will lie.

The remedy of prohibition is expressly given by Section 234 (Sec. 1211) of the Judicial Code in matters of admiralty jurisdiction.

Section 262 (Sec. 1239) of the Judicial Code provides that:

“The Supreme Court and the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, and which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.”

Under the authority of this section, the jurisdiction of the Supreme Court to issue writs of prohibition in respect to common law and equity proceedings is sustained.

In *Naganab v. Hitchcock*, 202 U. S. 473, the Court, in holding that the court below had no jurisdiction of a suit which was against the United States, said:

“Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is **no jurisdiction to entertain this case**. In respect to this question it is on all fours with **State of Oregon v. Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office**, decided on April 23 of this term (202 U. S. 60). * * * Upon the authority of the **Oregon** case we hold that there is **no jurisdiction to maintain the present suit**, and the action of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is **affirmed.**”

In *Smith v. Whitney*, 116 U. S. 167, which was not an admiralty proceeding, it was said:

“But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right.”

In **In re Rice**, 155 U. S. 396 (not an admiralty proceeding), it was said:

“Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right.”

In Matter of Simons, 247 U. S. 231, was an application to this Court for mandamus, or if that be denied, for prohibition, to prohibit the District Court from proceeding with a cause which petitioner claimed had been erroneously transferred from the law side to the equity side of the court. The Court held that the District Court had no right or power to transfer the cause from the law to the equity side of the court and that it was immaterial what form of extraordinary remedy was afforded to grant relief, although mandamus was adopted as the remedy in that instance.

The Court said:

“If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.”

In **In re Railroad Company**, 255 U. S. 273, it was held that prohibition would lie to determine the question of the lower court's jurisdiction to proceed against petitioner in a cause in which petitioner claimed it had not been served with process, although in that particular case the rule was discharged and the petition dismissed because it appeared that the petitioner below had filed certain motions and taken certain other steps in the cause which might have constituted a general appearance, and it was held to be within the province of the District Court to determine whether petitioner had in fact entered its general appearance in the cause despite the fact that it had not been served with process. It was there said:

In Ex Parte State of New York, 256 U. S. 490, this Court, in dealing with a jurisdictional question identical with the one here, that is, lack of jurisdiction because the proceeding was, in effect, a suit essentially, but not formally, against the state, and in which a right of appeal existed, said:

“The want of authority in the District Court to entertain these proceedings * * * and the fact that the proceedings are in essence against the state without its consent is so evident that, instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued, as prayed.”

tioner's objection, a cause on the law side of the Court to an auditor to make a preliminary investigation as to the facts, hear the evidence and report his findings, with a view to simplifying the issues for the jury. The Court said:

“Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was held in *Ex parte Simons*, 247 U. S. 231, 239, ‘be dealt with now, before the plaintiff is put to the difficulties and the court to the inconvenience that would be raised by a proceeding that ultimately must be held to have been required under a mistake.’ The objection to our jurisdiction is unfounded.”

It, therefore, appears that prohibition is the proper remedy for the situation here, whether the writ is viewed as one of right or as dependent upon the discretion of the Court, provided the suit is one in essence against the United States.

II.

IS THE SUIT IN QUESTION ONE AGAINST THE UNITED STATES ?

No one will deny that a sovereignty such as the United States or the constituent states cannot be sued either in its own courts or in the courts of another sovereignty, without its consent having been expressly given. So it cannot be denied that if the suit, although nominally not against the sovereignty, is so in essence and effect, then such suit cannot be maintained. These propositions are supported by abundant authorities, which we will hereafter present. So that the vital consideration is to determine whether or not this suit is one in essence and effect against the United States. That question can best be determined by a consideration of the bill of complaint. Let us proceed to analyze that bill for the purpose of ascertaining just what it is.

In the first place, it will be noted that the three defendants are officials of the United States, impleaded as such. The bill recites, in a preliminary way, the situation antecedent to the making of the contract which is the basis of the suit, and which is set out early in the bill. The contract is between the United States and Edward F. Goltra, and its terms have been sufficiently set forth in our statement.

Paragraph 8 of the contract is as follows:

"8. The lessor reserves the right to inspect the plant, fleet and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; **and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor**, and all moneys in the treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

The bill then sets out a supplementary contract which deals with the contemplated erection of unloading facilities at St. Louis, the details of which are not necessary to be specifically referred to, except that it is provided in substance, as in paragraph 8 of the first contract, that the lessor may retake possession of the unloading facilities as is provided in said paragraph 8 of the first contract with reference to the boats.

The bill then proceeds to allege that after a complainant had taken over said towboats and barges he was interfered with by the officers of the United States, particularly the Secretary of War, in performing the duties and obligations imposed upon him by the said contract, the details of which are not necessary to specifically narrate, except that it is averred that by the

“acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contracts from carrying out the terms and conditions of the said contracts as a common carrier, or as a private carrier, or in any other manner provided by said contracts; and it became and was and is impossible for the plaintiff to so carry out the contracts under the terms and conditions thereof, unless and until the **lessor** therein, **being the United States**, causes and permits the plaintiff to carry out the conditions of said contracts in manner and form and for the purposes contemplated by said contracts.”

Complainant thereupon avers that said contracts constitute in law a contract of charter and lease together with a contract of privilege and option in the complainant to purchase the boats on the terms and conditions therein stated, and that said contract established in the complainant a fixed and definite property right in said towboats and barges, of which the complainant could only be lawfully deprived “by a proceeding in equity for an accounting and a determination by a decree of court of the **lawful interest of each of the parties thereto in the subject matter of said contracts.**”

The bill thereupon alleges that the defendants did, on March 3, 1923, wrongfully and unlawfully undertake to declare said contracts terminated, and did de-

mand from the complainant the immediate possession of the said boats without warrant of law, and threatened to take the same by force, and had actually begun the taking of the same, pursuant to said demand at the time of filing the bill.

The bill thereupon sets forth the notification of date March 3, 1923, of the Secretary of War to the complainant, and the memorandum of the said Secretary of War to the defendant Ashburn.

Following that the bill sets out the reply of the complainant to said communication.

Thereupon, the bill charges as follows:

“Plaintiff further avers that the United States, **acting through its lawfully authorized representatives**, has not at any time fulfilled the said two contracts of May 28, 1919, and May 27, 1921, by putting the plaintiff into a position or allowing him to take a position where he could carry out the conditions of said contracts, either as a common carrier or as a private carrier under said contract as defined in section 2 (a) of the original contract of May 28, 1919.”

Thereupon, the bill alleges the conspiracy between the defendants to deprive the complainant of his property, without due process of law, and the taking possession of the boats.

The prayer of the bill is for a restraining order,

without notice, enjoining the defendants from interfering with the possession by the complainant of the boats and barges, commanding them to return those taken, and restraining the **defendant Secretary of War** "from doing any act whatsoever **looking to the cancellation or other termination of said contract** of May 28, 1919, and said supplemental contract of May 27, 1921, **between the United States and said plaintiff,**" and enjoining the defendant Ashburn from doing any act in aid of the purpose of said Secretary of War to terminate said contracts and from further interfering with the possession by complainant.

The prayer finally concludes with the following:

"The plaintiff prays that on final hearing of this cause of action a decree may be entered in favor of the plaintiff and against the defendants and each of them, which **shall determine the rights of plaintiff as set forth herein under said contracts,** and perpetually enjoin and restrain the said defendants from interfering in any way with said rights."

This bill is, in legal effect, one to specifically enforce the contract set forth therein, and to restrain the exercise by the opposite party, the United States, of its contractual right to terminate the contract, for the reason that conditions under which the contract might be terminated by its terms do not exist.

The final decree, if one be passed in this case, would be to declare the right of the complainant to the avails of the contract, that is, the possession and the right to operate the boats, and to restrain the defendants from declaring a forfeiture and retaking possession of the boats, as is provided in the contract.

If the contracting parties in this case were Mr. Goltra and the corporate owner of these boats, and the defendants were the officers and agents of the corporate owner, could it for a moment be said that a bill of this sort would lie without making the corporate owner a party? The answer is obvious, because the bill would be one to specifically perform a contract and to adjudicate the lack of right and power to terminate it, which relief could only be had against the other party to the contract. So we say in this case that the United States, as owner, is a necessary and indispensable party to this bill, for that the relief sought is in effect a decree against it, and not against the individual or official defendants.

The defendant officers have no interest in the subject matter of the contract or in the controversy, except as their duty may require them as representatives of the Government to exercise discretion under the contract. In the exercise of this discretion, they act for the United States. The United States could only exercise its right of cancellation

through its proper officers and its exercise being a matter of discretion and not a mere ministerial act. it is the act of the United States and not subject to review by the courts.

If the lessor were an individual or private corporation, and a situation arose as here, the lessor would be a necessary party, and the decree would be primarily against it, and secondly, its agents. The lessor here being the Government cannot be made a party defendant, and yet the decree would operate against and bind it as fully as if it were, for those who alone may act for it are bound, and so it is bound. A contract right belonging to the Government with respect to its own property would be denied in a proceeding to which it is not a party. Such a result could only be where it in essence is a party.

THE DECISIONS.

The cases dealing with the question as to whether or not suits against officers of a state, or the United States, are, in effect, suits against the sovereignties themselves, seem to classify themselves under three heads:

(1) Those holding that suits to enjoin the performance of official or discretionary duties of officers and agents of the sovereignty are, in effect, suits

against the sovereignty and cannot be maintained without its express consent.

(2) Suits involving property rights of the sovereignty which cannot be maintained without such consent.

(3) Suits affecting actions of officers and agents of the sovereignty when such actions are illegal, arbitrary, purely ministerial or otherwise in excess of authority, which are not, in effect, suits against the sovereignty.

It is our contention that this proceeding comes within one or the other, or both, of these first two classifications.

In **Hagood v. Southern**, 117 U. S. 52, the State of South Carolina issued bonds which provided that they should be receivable in payment of taxes. It was also provided in the act authorizing the issuance of these bonds that an annual tax of three mills for every dollar of taxable property should be levied to secure the redemption of such bonds. Subsequently, the state repealed the act for the levy of a tax of three mills for the redemption of such bonds and enacted a statute providing that such bonds should not be receivable in payment of taxes. The plaintiffs as owners of these bonds thereupon instituted suit against defendants as officials of the state to compel them to levy the three-mill tax for the redemption of these bonds and to accept the same in pay-

ment of taxes. The Court held that the suit could not be maintained because it was, in effect, a suit against the State of South Carolina, which had not given its consent to be sued.

The Court said (l. c. 67):

“These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the state is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the

prohibition of the Eleventh Amendment to the Constitution of the United States.

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“If this case is not within the class of those forbidden by the constitutional guaranty to the states of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be. If the state is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a state could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the state according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the state itself. If not, it may well be asked, what would constitute such a proceeding?”

In re Ayers, 123 U. S. 443.

The State of Virginia issued bonds in which it was provided that the coupons thereto should be receivable by the state in payment of taxes. The plaintiffs were the purchasers of a large number of these bonds, some of which they sold to residents of the state at discount, to be used by the purchasers in payment of their taxes. Shortly after the purchase

of these bonds the State of Virginia passed an act prescribing certain conditions which should be complied with before the coupons on these bonds should be receivable in payment of taxes, which were so stringent as to nullify, in effect, the provisions of the bonds that the coupons thereto should be receivable in payment of taxes. The plaintiffs thereupon instituted suit to enjoin the Attorney-General and other officials of the State of Virginia from instituting actions for the collection of taxes against these residents of Virginia who had tendered these coupons in payment of their taxes, asserting, *inter alia*, that the subsequent conditions imposed by the state as a prerequisite to the right to have these coupons accepted in payment of taxes and the institution by defendants of actions for the recovery of taxes against residents of Virginia, who had tendered coupons in payment of their taxes, would impair the obligation of, and constitute a breach of, the contracts represented by the bonds.

The Court held that this suit was against the State of Virginia, and, as that state had not consented to the institution thereof, it could not be maintained.

The Court said (l. c. 502):

“Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by

the acts of its General Assembly, referred to in the bill of complaint, there is, nevertheless, no foundation in law for the relief asked. **For a breach of its contract by the state, it is conceded there is no remedy by suit against the state itself.** This results from the Eleventh Amendment to the Constitution, which secures to the state immunity from suit by individual citizens of other states or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the state by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the state by name, it is admitted, could not be brought. In *Hagood v. Southern*, 117 U. S. 52, it was decided that in such a bill, where the state was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the state, where 'the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state,' the court was without jurisdiction, because it was a suit against a state.

"The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state.

In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state.

* * * * *

“But where the contract is between the individual and the state, no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution.”

In **Wells v. Roper**, 246 U. S. 335, decided in 1918, the Supreme Court held that where the First Assistant Postmaster General, in accordance with a decision of the Postmaster General, undertook to terminate an existing contract for automobile mail service at Washington, D. C., to make place for a similar service to be conducted by the department under a special appropriation, his action being based upon

the supposed authority of the contract itself, and being purely official, discretionary and within the scope of his duties, a suit to restrain him from annulling the contract and from interfering with its further performance was in effect a suit against the United States, and was, therefore, properly dismissed.

This case is so like the Goltra case that we think it advisable to quote at length from the pertinent expressions of this Court upon the question now under consideration (page 337):

“The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff’s contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff’s interests were at all endangered by what he proposed to do.

“That the interests of the government are so directly involved as to make the United States

a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. **And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.** (See **Noble v. Union River Logging Railroad**, 147 U. S. 165, 171, and cases cited; **Belknap v. Schild**, 161 U. S. 10, 17, 18; **American School of Magnetic Healing v. McAnnulty**, 187 U. S. 94, 108; **Philadelphia Co. v. Stimson**, 223 U. S. 605, 620.

“The United States has consented to be sued in the Court of Claims and in the district courts upon claims of a certain class, and not otherwise. Hence, without considering other questions

discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous."

By executive order dated March 12, 1919, Woodrow Wilson, President of the United States, did, in connection with the towboats and barges mentioned in the bill of complaint, "withdraw from the United States Shipping Board such part of the said power and authority so vested in me (him) under said laws with reference to the operation, management and disposition of vessels as relates to such river barges and towboats, and do (did) hereby delegate to the Secretary of War the power and authority so withdrawn from the United States Shipping Board, to be by the Secretary of War executed through contract or otherwise as, in his judgment, may be most economical and advantageous to the United States."

It is provided in the United States Transportation Act of 1920, Title 2, Section 201 (d), as follows:

"Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis."

The towboats and barges involved in this controversy are the only facilities within the description of this section, and are the facilities so referred to.

The case of *Wells v. Roper*, 246 U. S. 335, is, in our opinion, on all fours with this case. The facts in this case are, if anything, stronger than in that. In this case the boats are the property of the United States, and, even if Mr. Goltra should exercise his option, they remain the property of the United States until fully paid for. The right to the cancellation of this contract and to the return of the boats and barges to the United States was a stipulation of the contract itself. Under this right of cancellation and to retake possession, the government has taken and is in possession of the boats and barges. The complainant's reply to the Secretary of War set forth in the bill and the whole frame of the bill disclose that the position of the complainant is that the complainant has complied with his contract, and that the **right** to the cancellation of the contract has not accrued. This was the contention of the complainant in the *Wells-Roper* case, which the Supreme Court met in very apt language in the closing paragraph of its opinion, wherein it says:

"And neither the question of official authority, nor that of official discretion, is affected, for present purposes, by assuming or conceding for the purposes of the argument that the proposed

action may have been unwarranted by the terms of the contract, and such as to constitute an actionable breach of that contract by the United States."

It is our desire not to make this memorandum unnecessarily long. There are, however, other instructive cases dealing with the question here involved, which we refer to in an addenda following this memorandum, to which the Court may refer in the event the authorities already quoted from are not sufficiently persuasive.

We respectfully submit that the Court should enter the order to show cause prayed for herein, and that the writ of prohibition be allowed, and, upon final hearing, be made absolute.

Respectfully submitted,

HARRY M. DAUGHERTY,
Attorney-General,

JAMES M. BECK,
Solicitor General,

LON O. HOCKER,
Special Assistant Attorney-
General.

ADDENDA.

In *The Siren*, 7 Wall. 152, a boat belonging to the United States collided with and sunk a boat owned by private parties. The Court held that a libel in rem against the boat of the United States would not lie without the consent of the Government. It was said (l. c. 153):

“It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation of the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of congress. Such is the language of this court in **United States v. Clarke**.

“The same exemption from judicial process

extends to the property of the United States, and for the same reasons.

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“For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

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“So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises.”

It was held, however, that the rule which precluded a suit against the United States did not apply where the United States itself instituted suit. In

such instances it was held that private persons might offset against the claim of the Government any claim which they in turn had against the United States. In this case, the boat in question was a prize of war, and, upon reaching port, a libel in prize was filed against her and she was condemned and sold. It was accordingly held that the parties owning the boat which was sunk had a claim against the proceeds realized from the sale of the Siren, on the ground that the institution by the United States of a libel in prize against her was the institution of an action by the United States and was within the qualification or exception to the general rule, and entitled the owner of the sunken ship to damages out of the money realized upon the sale of the boat.

Oregon v. Hitchcock, 202 U. S. 60.

The State of Oregon instituted suit against Hitchcock, Secretary of the Interior, to enjoin him from allotting certain lands to Indians within the limits of the Klamath Reservation in the State of Oregon, which claimed that the land in question was swamp and overflowed land which had been granted by the United States to Oregon upon its admission into the Union, and that the title to such land was therefore in the state. The Court held:

1. That while the suit was nominally against the Secretary of the Interior, the United States was the

real party in interest, and the suit was in reality against the United States, because the legal title to the land in question was in the United States.

2. That a suit could not be maintained against the United States without its consent.

The Court said:

“The question of jurisdiction in a case very similar to this was fully considered in **Minnesota v. Hitchcock**, *supra*. There, as here, a state was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the ‘Red Lake Indian Reservation.’ This suit is brought by a state against the same officers to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

“ ‘Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the government of its title and vest it in the state. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the

fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.' ”

Naganab v. Hitchcock, 202 U. S. 473.

This was a suit by the plaintiff, a member of the Chippewa Indian tribe, to enjoin the defendant Hitchcock, Secretary of the Interior, from executing a certain act of Congress, and to compel him to account under the Act of January 4, 1889, for the proceeds of the sale of land the title to which was in the Government. The Court held that since the title to the lands in question was in the United States, the suit was against the United States, which could not be sued without its consent, and said:

“It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to con-

trol the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of congress without judicial intervention, as was held in the court of appeals, we are of opinion that there is no justification to entertain this case. In respect to this question it is on all fours with **State of Oregon v. Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office**, decided on April 23 of this term (202 U. S. 60). That case was distinguished from **Minnesota v. Hitchcock**, 185 U. S. 373, relied on here by the appellant, in the fact that in the **Minnesota** case the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the government of full responsibility for the result of the decision so far as the Indians were concerned (Act of March 2, 1901, 31 Stat. 950). In this case, as in the **Oregon** case, the legal title to all the tracts of land in question is still in the government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of congress in anywise authorizing this action. Upon the authority of the **Oregon** case we hold that there is no jurisdiction to maintain the present suit, and the action of the Court of Appeals of the District of Columbia, affirming the

decree of the Supreme Court of the district dismissing the complainant's bill, is **affirmed.**"

Stanley v. Schwalby, 162 U. S. 255.

This was an action in trespass to try title to certain land occupied by the defendants as officers of the United States. The record title to the land in question was in the United States in fee simple. The plaintiff, on the other hand, claimed title in fee simple to a certain portion of the land by virtue of a prior unrecorded deed from the original owner of the party and asserted that the United States had notice of her prior deed at the time it acquired title to the property. The United States was not formally made a party to the action, but the District Attorney, acting under instructions, undertook to intervene in the action as a party defendant.

The Court held that as the title to the land was in the United States, the suit, although nominally against the officials of the United States, was in reality against the Government, which could not be maintained without its consent.

"The judgments of the courts of the State of Texas appear to have been largely based on *United States v. Lee* (106 U. S. 196), above cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United

States lands used for a military station and for a national cemetery. The Attorney-General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action, and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of congress; and that the United States would not be bound or concluded by the judgment against their officers (106 U. S. 199, 206, 222).

* * * * *

“In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third, to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part

awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers."

In Carr v. United States, 98 U. S. 433, 437, the Court said:

"We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no state can pass a law, which would have any validity, for making the government suable in its courts. It is conceded in **The Siren** (7 Wall. 152) and in **The Davis** (10 id. 15), that without an act of Congress no direct proceeding can be instituted against the government or its property. And in the latter case it is justly observed that '**the possession of the government can only exist through its officers**'; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession.' If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post office or a custom house, a prison or a fortification.

.

"The cases like **The Siren** and **The Davis**, already referred to, and many others therein

cited, in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected. The 'Siren' was brought into the port of Boston as prize, was libelled, condemned and sold, and the proceeds paid into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with the 'Siren' during her voyage subsequent to the capture. It was held that inasmuch as the United States had resorted to the aid of the court to procure the condemnation of the 'Siren,' and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the government, might well be satisfied out of such proceeds. At the same time it was conceded that neither the government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some act of Congress (7 Wall. 154). The 'Davis' and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a

contract of affreightment. The government appeared as claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the government could not be taken out of its own possession by any direct proceeding."

In *Louisiana v. Garfield*, 211 U. S. 70, it was held that a bill brought by the State of Louisiana against Garfield, Secretary of the Interior, to establish title to, and prevent other disposition of, lands claimed under swamp land grants, was in reality a bill against the United States, which could not be maintained without its consent.

See, also, to the same effect, *New Mexico v. Lane*, 243 U. S. 52.

Goldberg v. Daniels, 231 U. S. 218, was a petition in mandamus to compel Daniels, Secretary of the Navy, to deliver the United States Cruiser Boston to petitioner, in which it was asserted that after survey and condemnation the cruiser had been condemned; that, thereafter, and in accordance with the Acts of Congress, the Secretary of the Navy had advertised the cruiser for sale and that plaintiff was the highest bidder, and that he was therefore entitled to the boat. The Court held that as the

cruiser in question was the property of the United States the suit could not be maintained, and said:

“The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail (**Belknap v. Schild**, 161 U. S. 10; **International Postal Supply Co. v. Bruce**, 194 U. S. 601, 606; **Oregon v. Hitchcock**, 202 U. S. 60, 69; **Naganab v. Hitchcock**, 202 U. S. 473, 476).”

Belknap v. Schild, 161 U. S. 10, 11.

In this case the plaintiff, as owner of a patent for a caisson gate, brought suit against the defendants, alleging that they had infringed his patent rights and asking for an injunction and damages. The defendants were officials of the United States and averred that the only caisson gate that was under their supervision and control was located in a navy yard belonging to the United States, and that the gate had been built by other parties under a contract with the United States.

It was held that the grant of letters patent entitled the grantor to the exclusive right to the patent as against the world; that as the United States has consented, by various statutes, to the institution of suits against it upon their contracts, it might, therefore, be sued by a patentee for the use of his invention under a contract made with him by the

United States or its authorized officers; that the exemption of the United States does not protect their officers from being personally liable to an action of tort by a private person whose rights of property have been invaded, but that the United States is not liable for, nor consented to be sued for, wrongs done by its officials in the discharge of their duties.

It was accordingly held that in so far as the defendants had themselves infringed plaintiff's patent rights the suit was not against the United States, but was against the defendants personally. However, it was held that with respect to the injunction sought to restrain the use of the gate in question, the suit was against the United States because the United States owned the property.

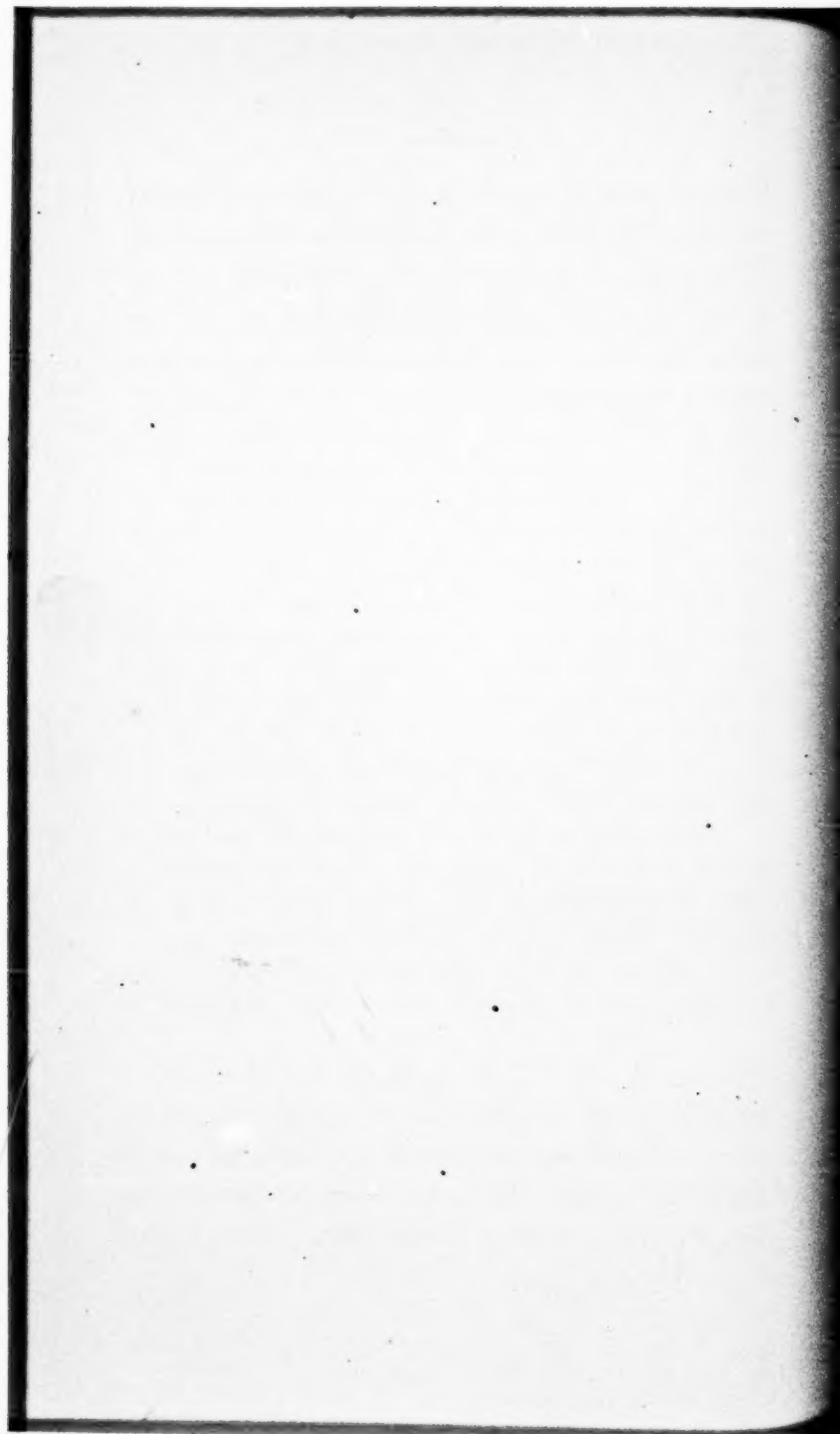
The Court in this connection said (l. c. 24):

“In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. **The United States could not hold or use it, except through officers and agents.**

Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party against whom alone in fact the relief was asked and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity and in the exercise of their official functions as representatives of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare, and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

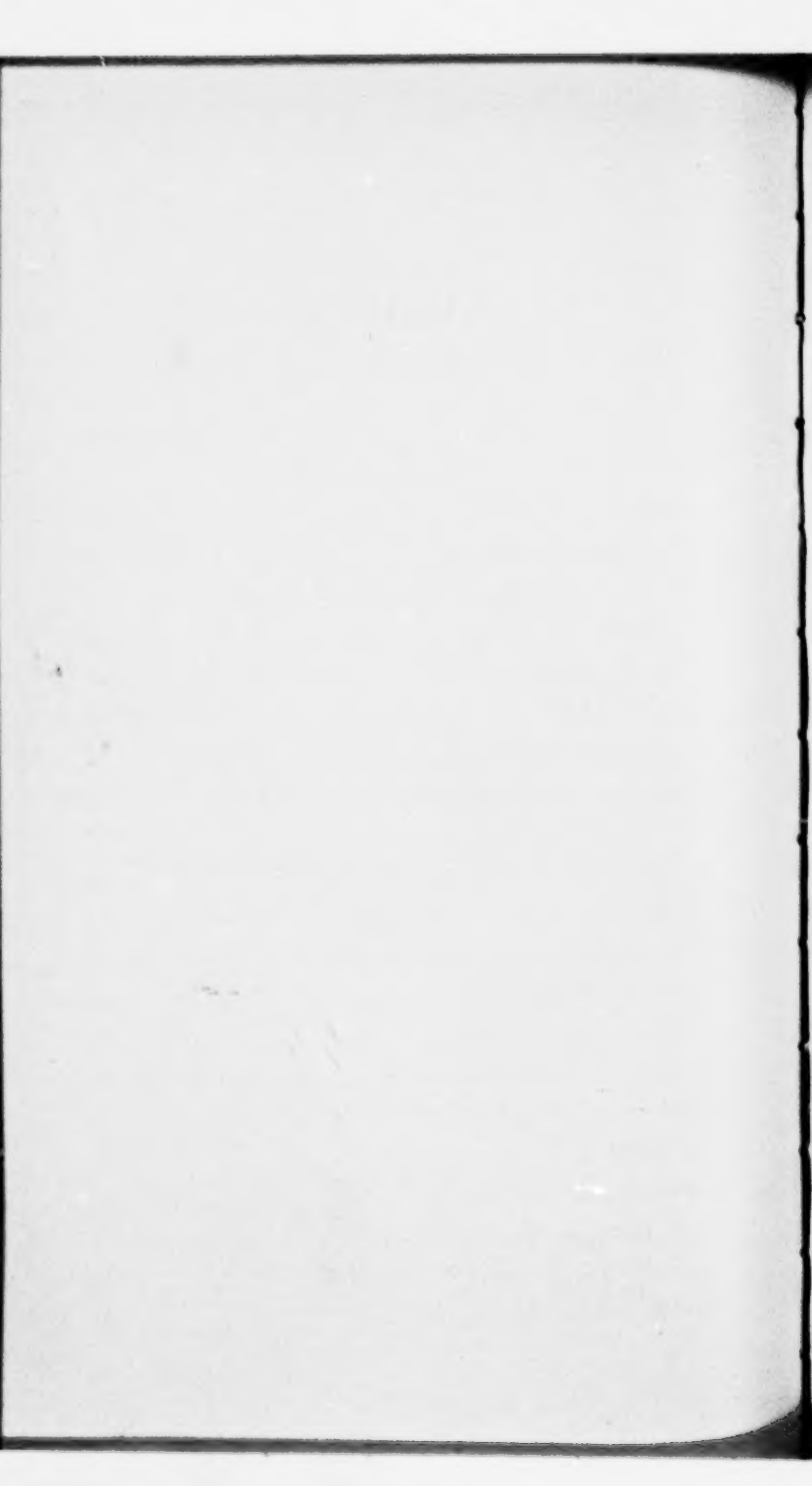
In *Louisiana v. McAdoo*, 234 U. S. 627, it was held that a suit against the Secretary of the Treasury to review his action in determining the rate of duty to be collected, under statutes and treaties, on an imported article, which action involved judgment and

discretion, and to mandamus him to collect a specific amount, is in effect a suit against the United States, and that as the case did not come within any of the exceptions to the established rule that the United States cannot be sued without its consent, it was properly dismissed.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETI-
TION OF THE UNITED STATES
OF AMERICA, AS OWNER OF } No. 23
NINETEEN BARGES AND FOUR
TOWBOATS.

**STATEMENT, BRIEF AND ARGUMENT OF
RESPONDENTS**

THE QUESTION HERE PRESENTED IS:

Has the District Court jurisdiction to restrain the defendants, officers of the United States, from attempting to, and continuing to, do an unlawful act or acts, without valid authority in law or fact, and in excess and abuse of their lawful authority, thereby invading the private rights and property rights of the complainant secured to him by the Constitution, and to restrain them from depriving the complainant of his private rights and private property and from creating and maintaining a cloud upon the property rights of com-

plainant, and compel the return of said property which complainant alleges was taken by defendants unlawfully, by force, without valid authority in law or fact, and in excess and abuse of their lawful authority, and is now being so retained by them?

FACTS

According to the allegations sworn to in complainant's bill of complaint, duly verified by affidavit, during the war between the United States and Germany, complainant herein "at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view of producing pig iron at St. Louis, Missouri," as a result of which complainant "entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee (complainant herein) did create obligations on the part of the United States to the said lessee (complainant herein)." As part of that undertaking as a war measure, which was to and did involve many millions of dollars, the government through "the United States Shipping Board Emergency Fleet Corporation, ALLOTTED TO THE CHIEF OF ENGINEERS THE SUM OF \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Mo.," and "ON THE 1st DAY OF AUGUST, 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal."

Thereafter, on November 11th, 1918, said war preparations ceased and the government began terminating all of its war contracts and engagements with many and enormous financial obligations due said contracting parties, including this complainant, and found itself with many millions of dollars worth of finished and unfinished property on hand for which it had no use in the administration of the governmental affairs and was forced to dispose of same to the best advantage.

Like most of its war emergency undertakings, the matter of utilizing the MISSISSIPPI RIVER FOR THE TRANSPORTATION OF IRON ORE AND COAL WAS AN EXPERIMENT, and the ADAPTABILITY OF SAID TOWBOATS AND BARGES, theoretically designed, WAS ALSO EXPERIMENT, and CONTINUED TO BE AN EXPERIMENTAL PROPOSITION AND UNDERTAKING even after said boats and barges were completed.

As a result of the foregoing the government through its Chief of Engineers found itself in the position with a lot of boats and barges on hand and in the course of construction, which were useless to the government in time of peace and also of an uncertain value for private business undertakings because of the experiment necessary to demonstrate, and having contracted for the construction of the same "THE CONSTRUCTION OF WHICH IN THE OPINION OF THE SECRETARY OF WAR IS NECESSARY TO ENABLE THE GOVERNMENT TO DISPOSE OF THE SAID BARGES MORE ADVANTAGEOUSLY," and because "THE SAID FLEET OF TOWBOATS AND BARGES IS ESPECIALLY DESIGNED FOR AND ADAPTED TO

THE TRANSPORTATION OF IRON ORE AND COAL," the government sought complainant because of his business for which said fleet was designed, as the party to whom it could dispose of same to the best advantage.

CONSIDERATIONS FOR THE CONTRACT, moving to the government and for the government's advantage "TO ENABLE THE GOVERNMENT TO DISPOSE OF THE SAID BARGES MORE ADVANTAGEOUSLY," and moving from complainant to the government, (referring to complainant's claim against the government) "WHICH HE (complainant) ENTIRELY RELEASES AND DISCHARGES in part consideration of this lease, which engagements, undertakings and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities."

The foregoing was the BASIS upon which the contract was made and the CONSIDERATIONS therefor.

CONTRACT

"This lease, made this 28th DAY OF MAY, 1919, between the United States of America, REPRESENTED BY MAJOR GENERAL William M. Black, CHIEF OF ENGINEERS, UNITED STATES ARMY, directed by the Secretary of War SO TO REPRESENT THE UNITED STATES, hereinafter DESIGNATED AS THE LESSOR, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second part."

"Now therefore, the said LESSOR doth hereby charter and lease unto the said lessee FOR A TERM OF FIVE (5) YEARS, beginning with the date of delivery, to the lessee of the first barge or towboat the following described property:"

Covenants and Agreements

"2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier."

(b). Has to do with lessee paying all operating expenses and maintaining the fleet in good operating condition to the satisfaction of THE LESSOR; to hold the United States free from liability, etc., in connection with operation, care and maintenance; discharge maritime liens; lessee to INSURE, both fire and marine, in such an amount as in the judgment of the Secretary of War—may require—against physical injury to them; Lessee to provide FIRE, MARINE and TOWERS' LIABILITY INSURANCE as in the judgment of the Secretary of War, etc., insuring each against such injury as may be inflicted by such vessel upon other property, etc., and if the lessor shall require,

lessee to provide \$300,000 bond to protect United States against such liability or obligations, and against maritime or other liens and against depreciation in value, etc.

(b-1) All salvage earned—shall be for benefit of United States.

(c) For protection of persons furnishing materials, services and labor in connection with operation, furnishing, repair, care and maintenance, etc., lessee to furnish bond for \$200,000.

3. Net earnings above operating expense and maintenance for every ton of cargo moved, and other net earnings shall be turned over to Secretary of War, etc., for deposit with the Treasurer of the United States," in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall until all vessels of the government fleet are delivered to the lessee, be

subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expense and maintenance in connection therewith.

Lessee to keep accurate account, "and his accounts shall at all times be subject to inspection by the lessor."

4. Provides for selection of national bank depositories.

5. (OPTION TO PURCHASE).

"Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

"(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent, per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required

for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

“(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent, per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

“(e) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of the lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

“6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

“There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of

the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The Lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent, per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

7. Lessee assumes full responsibility for all employees, plant and material, boat and barges and for damage or injury done to or by them.

8. "The lessor reserves the right to inspect the plant, fleet and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

The contract is signed:

"William M. Black, Major General, Chief of Engineers, U. S. Army (First Party).

"Edward F. Goltra (Second Party)."

Memo.:

At the end of the contract is a written memorandum in part as follows:

"It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army and Edward F. Goltra PARTIES OF THE FIRST PART AND OF THE SECOND PART RESPECTIVELY:"

Supplemental Contract:

"Whereas, On the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) towboats, belonging to the United States.

"And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified for the following reasons:

"To more fully provide for the operation of the said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of \$3,860,000.00 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions.

"Now, therefore, The said contract is, by this Supplemental Agreement between Major General Lansing

H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:"

Among other things therein, it is provided that "lessee, at his own expense, WILL PROVIDE THE NECESSARY TRACT OF LAND AND RUN-WAY on which the said unloading facilities are to be erected—SAID TRACT TO BE SELECTED BY THE LESSOR, subject to the approval of the lessee.

Lessee to provide insurance.

"THE ITEMS OF THE ORIGINAL LEASE as to INSPECTION (PARAGRAPH 8) shall govern so far as applicable and pertinent, etc."

"The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and run-way on which the said unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to approval by the lessee, and said run-way to be built according to plans submitted by lessee and approved by the lessor.

"The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and character mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

"The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

"The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

"The terms of the original lease as to net earnings (paragraph 3) appraisement and option to purchase, and conditions of purchase (paragraph 5) method of payment in the event of purchase (paragraph 6), inspection (paragraph 8) shall govern so far as applicable and pertinent to the said unloading facilities.

"In case the said lessee, his heirs, administrators, executors or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case the lessor may, without let or hindrance by the said lessee, his heirs, administrators, executors or assigns, take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

"In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and run-ways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

"THIS SUPPLEMENTAL AGREEMENT shall be subject to the approval of the Secretary of War.

"In witness whereof the parties aforesaid have here-

unto placed their signatures at the time of execution of this agreement.

WITNESSES:

P. J. Dempsey, as to Lansing H. Beach, Major General, Chief Engineers.

Thomas M. Robins, Major, Corps of Engineers, as to Edward F. Goltra.

Approved: May 27, 1921, J. M. Wainwright, Assistant Secretary of War."

The bill alleges that all of the terms and conditions precedent specified in said contract and supplemental contract were strictly, and duly complied with on the part of the lessee, AND ON JULY 15, 1922, said lessor, the Chief of Engineers of the U. S. Army, turned over and delivered said boats and barges thereunder to complainant herein, after COMPLAINANT herein had SECURED, at his own expense, and TURNED OVER to the Chief of Engineers, FIRE, MARINE, AND LIABILITY INSURANCE.

After the delivery of said boats and barges the lessee was obliged, at large expense to himself to make certain changes, alterations, and repairs, thereon before same was adaptable for transportation service on the river.

On March 25th, 1923, and prior thereto said contract and supplemental contract were completely executed by both parties thereto, and said lessor therein had duly and completely turned over and delivered all of said property to complainant herein as his property for a term of five (5) years with option in him to purchase, and complainant was in possession.

THE COMPLAINANT HAD, IN ALL RESPECTS, FULLY COMPLIED WITH ALL TERMS AND CONDITIONS OF SAID CONTRACT AND SUPPLEMENTAL CONTRACT, except wherein he was prevented with so complying with certain terms and conditions by the Secretary of War and these defendants as set forth in the Bill of Complaint.

SEIZURE:

The bill then avers that WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO BE HEARD, ON SUNDAY, MARCH 4th, 1923, in THE CITY OF WASHINGTON, D. C., the complainant was served by Col. T. Q. Ashburn with the following notice:

"WAR DEPARTMENT

Washington

March 3, 1923.

E. F. Goltra, Esq.,
LaSalle Building,
St. Louis, Missouri.

Sir:

Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four tow boats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said tow boats and barges as a common carrier and in other particulars.

I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said tow boats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by the funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice and who is instructed and authorized to receive and receipt the property herein mentioned.

Yours very truly,

(Sgd.) John W. Weeks,
Secretary of War."

On the same day, March 3rd, 1923, the following written instructions were given to Col. T. Q. Ashburn:

"23288

"WAR DEPARTMENT
Washington

March 3, 1922.

Memorandum for Colonel Ashburn:

My instructions in reference to the cancellation of the Goltra contract are, that you proceed to St. Louis, Missouri, and deliver to Edward F. Goltra in person, the notice herewith inclosed of the termination of his contract and the supplement thereto and make demand on him for the return of possession of said property to you as the agent of the United States, giving to him proper receipts for all of said property so delivered to you.

In the event of his failure or refusal to make delivery of the property demanded **you will apply to the United States District Attorney at St. Louis requesting the institution of legal proceedings for the recovery of said property.**

(Signed) JOHN W. WEEKS,
Secretary of War."

Thereupon Col. T. Q. Ashburn proceeded to St. Louis, Missouri, and demanded that complainant herein reply to the foregoing notice by 5 o'clock P. M., Thursday, March 8th, 1923.

On March 8th, 1923, complainant delivered the following reply to Col. T. Q. Ashburn in the City of St. Louis, Missouri.

"March 8, 1923.

"To the Honorable The Secretary of War,
Washington, D. C.

Sir:

On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges, and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

This notice was served upon me while I was in Washington on other business, and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have in face of most unjust interference and restrictions fully complied with all of the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice I now request.

Very respectfully yours,

(Signed) Edward F. Goltra."

On Friday, March 9th, 1923, the defendants suggested to complainant that the defendants might use force in taking physical possession of the property in-

stead of proceeding by an action in court against complainant to recover possession.

No reply was made to complainant's letter of March 8th, nor was he given any other notice.

On March 25th, 1923, Sunday, at about ten o'clock in the forenoon, without notice or warning to complainant or any of his agents or representatives, said Col. T. Q. Ashburn with a large force of men, removed four tow boats and one barge from the Missouri shore, at the St. Louis port, to the Illinois shore and while said bill of complaint was in the course of preparation, on said Sunday, Col. Ashburn with the force of men returned to the Missouri side and proceeded to seize and take to the Illinois shore side the additional barges. The restraining order was issued between the hours of six and eight P. M. on said Sunday.

On Friday, April 20th, 1923, in response to the order of this Court said boats and barges were returned to St. Louis Port and within the jurisdiction of the District Court.

ARGUMENT

The Attorney General, in his suggestions, undertakes to base conclusions upon abstract statements and allegations set forth in the Bill of Complaint, instead of considering the substance of the whole bill, in attempting to maintain that this is an action against the United States.

It is obvious that the bill, drawn hurriedly, upon Sunday, could not have been drawn with the same degree of accuracy as to the language used and in stating clearly all of the facts. The bill, however, as a whole does state the facts with sufficient accuracy and definiteness to enable the District Court to act upon, and the bill as a whole, in substance and form, clearly indicates and shows that this is not an action against the United States, and that the United States is not a necessary party for the purpose of the District Court granting the necessary and substantial equitable relief prayed for.

This is not an action for specific performance, but is an action for the purpose of maintaining and restoring the private rights and property rights under an executed contract. Nor can this action be construed to be one to divest title to property, but is one to restore the same and to place the parties in the same position in which they were before the alleged unlawful acts of the defendants changed that status.

All conditions precedent having been complied with by both parties to the contract up to and at the time

of the delivery of the property to complainant, and under the granting or charter clause all property and possessory rights being definitely and expressly fixed and vested, the contract in respect thereto was executed and left no property rights to be divested out of the United States.

The executory part of said contract pertains merely to certain covenants as to future obligations, rights, privileges, declaration of purposes and option to complainant to purchase.

The petitioner justifies the acts of the defendants under certain of these covenants which it would have this Court construe in a manner, not contemplated or intended by the parties, so as to enable them to maintain a forfeiture and seizure without court proceedings—and thereby deprive complainant of his rights and property—some of which are:

- (a) Complainant's claim against the United States which he released.
- (b) Complainant's property rights in and to said property theretofore enjoyed by him under his executed contract.
- (c) Complainant's property rights under the option to purchase.
- (d) Besides the financial losses to be sustained by reason of purchasing a tract of land for the loading facilities, the purchase of more than a million dollars of insurance, the securing of a \$200,000 bond, and the making of extensive alterations and establishing arrangements with prospective shippers.

FORFEITURE

The petitioner maintains that paragraph 8 of the contract gave to the Secretary of War, a discretionary right to declare a forfeiture of contract, to cancel same, to declare same void, and to take, arbitrarily, by force, said property from complainant without notice, without an opportunity to be heard and without an action in court.

In considering this paragraph it might be well to set out certain well established elementary principles of law which need no extended citation of authorities:

“Before forfeiture can occur, there must be no question but that the parties intended to provide for it in the contract under which it is attempted to be enforced AND WHEN THE CONTRACT IS REVOCABLE AT THE PLEASURE OF EITHER PARTY, WITHOUT CONDITION EXPRESSED, a penalty of forfeiture cannot be enforced against either making the revocation.

“FORFEITURES ARE ENFORCED ONLY WHERE THERE IS THE CLEAREST EVIDENCE THAT THAT WAS WHAT WAS MEANT BY THE STIPULATION OF PARTIES.

“Nothing but the clearest expression of such a design would justify the assumption that an executed contract was intended by either party as a snare. If technical forfeiture could be sustained by such intendment, the effect would be to weaken private confidence in commercial faith, and occasion just solicitude as to the security of important rights.”

6 Ruling Case Law, p. 906, Sec. 291.

“Forfeitures are not favored in law, and one who

seeks to enforce forfeiture must clearly establish his right to do so."

"Courts look with extreme disfavor upon forfeitures designed to destroy valuable rights bought and paid for, and will not enforce them unless compelled by the plain letter of the contract."

Hartman v. C. B. & Q. Ry. Co., 182 S. W. 148, 192 M. A. 271.

3 Story's Equity Jurisprudence, Chap. XXXVII, 14th Ed. 1918, Sec. 1728, sets forth the following:

"In reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss wholly disproportionate to the injury to the other party."

In the light of these well established principles attention is called to the contracts the essential parts of which have heretofore been set out.

1. WHO IS THE LESSOR DESIGNATED IN THE CONTRACTS AND WITH WHOM COMPLAINANT CONTRACTED?

The contract reads "between the United States of America, represented by Major General William M. Black, CHIEF OF ENGINEERS, United States Army, directed by the Secretary of War SO TO REPRESENT THE UNITED STATES, HEREINAFTER DESIGNATED AS THE LESSOR." Said contract is merely signed, "William M. Black, Major General, Chief of Engineers, U. S. Army (First Party)."

The alteration clause at the end of said contract reads: "It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army, party of the first part."

The supplemental contract, referring to the above reads as follows:

"WHEREAS, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army who, as well as his legally appointed successor, IS HEREINAFTER DESIGNATED AS THE LESSOR representing the United States of America."

Having the same question in mind, this Court in the case of Sloan Shipyards Corp. v. United States Shipping Board, etc., Oct. Term 1921, 258 U. S. 549, through Justice Holmes said:

"This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be MADE WITH THE FLEET CORPORATION,—a corporation organized and existing etc. (hereinafter called the 'CORPORATION'), REPRESENTING THE UNITED STATES OF AMERICA party of the second part. Throughout the contract the undertakings of the party of the second part are expressed to be the undertakings of the Corporation, AND IT IS THIS CORPORATION AND ITS OFFICERS THAT ARE TO BE SATISFIED in regard to what is required from the Iron Works.

"THE WHOLE FRAME OF THE INSTRU-

MENT SEEMS TO US PLAINLY TO RECOGNIZE THE CORPORATION AS THE IMMEDIATE PARTY TO THE CONTRACT."

United States District Judge Baker (Northern Dist. of W. Va. Aug. 1921—copy of opinion hereto attached), in the case of United States Harness Co. v. Graham, *et al.*, took the same view in the matter of a **"contract with the Government of the United States of America**, acting by and through E. C. Morse, Director of Sales, Supply Division, General Staff."

As in the Shipping Board Case (*supra*), so in this case—THE CHIEF OF ENGINEERING IS THE LESSOR and is plainly recognized as the immediate party to the contract. By the very terms of designation of parties he is so recognized and by their own interpretation in the clause to the contract and in the supplemental contract he is so designated.

As in the Shipping Board Case, so in this case, "Throughout the contract the undertakings" of the FIRST party are expressed as the undertakings of the lessor (Chief of Engineers) with the exceptions of certain specific things therein are to be subject to the approval of the Secretary of War.

The Secretary of War is not a party to this contract, but is designated therein for certain specific purposes ONLY.

(a) The money expended for the construction of the fleet was not appropriated to the Secretary of War but to the United States Shipping Board Emergency Fleet Corporation,—and was not allotted to the Secretary of War, but allotted to the Chief of Engineers.

(b) The Secretary of War, under Sec. 2 (a) must

consent to rates to be charged if less than prevailing rail tariffs—and may consent to the use of said fleet other than a common carrier.

(c) The Secretary of War shall determine the amount of insurance, but the approval of the companies is left to the lessor.

(d) Net earnings shall be turned over to the Secretary of War—who shall create a special deposit with the Treasurer of the United States.

(e) In the event of lessor and lessee being unable to agree upon overhead expenses, same shall be referred to the Secretary of War, whose decision shall be final.

(f) Under clause 7 relative to the option the Secretary of War may appoint the third member of a Board of Appraisers.

(g) Under paragraph 7 (b) the Secretary of War may retain certain deposits in the event of purchase under the option.

With exception to these specific provisions the Secretary of War is not mentioned therein and has absolutely no other authority, powers or duties.

Col. T. Q. Ashburn and the Chief of Inland and Coastwise Waterways Service and the Mississippi Warrior Service are in no way parties to said contract,—are in no way mentioned therein—and in no way are they or either of them given authority, powers or duties.

In all respects, except the foregoing, the Chief of Engineers designated as the lessor is the only and real party given the authority and powers and charged

with the duties of seeing that all covenants are carried out in said contract.

By the interpretation placed upon Paragraph eight (g) by the lessor himself in the supplemental contract it is exactly what the parties to the contract intended it to be, viz., "INSPECTION (paragraph 8)"—Sec. 8 provides that "The LESSOR (the Chief of Engineers) RESERVES THE RIGHT TO INSPECT the plant, fleet and work, at any time to see that all the said (inspection as to the plant, fleet and work) terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid monthly or oftener; and non-compliance (so far as inspection), in his (Chief of Engineers) judgment, with any of the (inspection) terms or conditions will justify his (Chief of Engineers) terminating the lease and returning (who could return the property other than the party in possession—the lessee?) the plant and said barges and towboats to the lessor (Chief of Engineers), and all moneys in the Treasury or in the bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

Clearly Paragraph 8 is an inspection provision reserved to the Chief of Engineers for certain specific things and upon inspection the Chief of Engineers might cancel said contract but only for a failure to comply with the specific things mentioned, for a forfeiture clause cannot be enlarged or added to.

The Paragraph has nothing to do with the covenant about operation of said fleet as a common carrier.

The Chief of Engineers has found no breach of the covenants or conditions referred to in said paragraph.

The Chief of Engineers (the lessor) has made no effort or attempt to declare a cancellation.

It will be noted that the Petitioner without doubt recognizes the Chief of Engineers as the only party, who had any right to declare a cancellation by having Major General Lansing H. Beach, the present Chief of Engineers, write the letter of April 27th, which was more than a month after the seizure. This letter is denominated "Exhibit Number 6" of the petition, and which is shown by the return to be no part of the record in this case. It is not necessary to comment further upon this Exhibit Number 6.

The Secretary of War has no express or implied authority, powers or duties under this paragraph.

The Chief of Inland and Coastwise Waterways Service, the Mississippi River Warrior Service and Col. T. Q. Ashburn have no authority, powers or duties under same.

The only party named or designated therein, who has any power or authority to receive said property is the lessor (Chief of Engineers).

Neither the Secretary of War nor Col. T. Q. Ashburn have any right, power or authority to receive, take or hold said property.

Certainly there can be NO INTERPRETATION of said paragraph which, by implication or otherwise, WOULD WARRANT EVEN THE LESSOR (Chief of Engineers) TO SEIZE SAID PROPERTY BY FORCE OF ARMS.

This was fully realized by the Secretary of War at the time he prepared his notice to complainant under

date of March 3, 1923, for in his instructions to Col. T. Q. Ashburn, same date, he directed Col. Ashburn as follows:

"In the event of his failure or refusal to make delivery of the property demanded YOU WILL APPLY TO THE UNITED STATES DISTRICT ATTORNEY AT ST. LOUIS REQUESTING THE INSTITUTION OF LEGAL PROCEEDINGS FOR THE SAID PROPERTY."

Even though said Paragraph 8 could be added to and enlarged so as to interpret the same with a view to empowering the Secretary of War to exercise such arbitrary powers under right of forfeiture, still the facts are such that the Secretary could not have declared a forfeiture upon the grounds of breach of covenant 2 (a) which pertains to the operation of said fleet as a carrier, especially without an opportunity on the part of complainant to be heard.

In the first place covenant 2 (a) has no provision therein or in any other part of the contract relative to cancellation or forfeiture.

The Petitioner has alleged in the petition for the writ that the bill of complaint filed in this cause stated that the right was reserved to the lessor "to terminate said lease and retake possession of said boats and barges," and at page 16 of the Suggestions it is again stated that the bill alleged that "the lessor may retake possession of the unloading facilities."

There is no allegation in the bill, or provision in either of the contracts, using this language. In no

place is there any provision that the lessor may re-take possession arbitrarily.

Said covenant is so ambiguous and uncertain as to make it impossible of explicit interpretation especially in view of the interpretation placed upon said covenant, from time to time, by the parties and the Secretary of War.

The facts as alleged show that complainant fully complied with said covenant in so far as he was able in view of the facts and circumstances as shown in the bill and that further compliance therewith was prevented and prohibited by the Secretary of War.

As is said in 3 Story's Equity Jurisprudence Sec. 1741:

“IF IN THE DEALINGS BETWEEN THE PARTIES, ONE HAS * * * PURPOSELY AND INTENTIONALLY BROUGHT SUCH CONDITIONS AND INFLUENCE TO BEAR UPON THE COMPLAINANT, THAT HE HAS BEEN COMPELLED TO ABANDON HIS INTEREST IN THE CONTRACT OR PROPERTY OR FAIL TO PROPERLY PERFORM HIS COVENANTS, SO THAT, STRICTLY SPEAKING, A FORFEITURE HAS OCCURRED, A COURT OF EQUITY WILL INTERVENE AND PREVENT THE ENFORCEMENT OF THE FORFEITURE.”

The Petitioner cites *Wells v. Roper*, 246 U. S. 335.

A careful reading of this case will disclose an entirely different state of facts and that it is not applicable to the case at bar.

In that case, based upon a contract with the Postmaster General acting for the United States, in its governmental capacity, the contract provided specifically that the Postmaster General or the First Assistant could terminate the contract under this stipulation; "any and all of the equipment contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part" and the "Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his contracts should be cancelled, etc."

Furthermore, it will be noted in that case, that in so doing the Postmaster General was acting in an official capacity under a specific appropriation of Congress for the very purpose contemplated in said contract wherein he was given discretionary power under the appropriation.

"Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, Chap. 33 etc., BY WHICH HE WAS AUTHORIZED IN HIS DISCRETION TO USE SUCH PORTIONS, etc."

The case of *United States Harness Co. v. Graham, et al.* not yet published, but a copy of the opinion, which was furnished to us by Judge Baker, is hereto attached, was, in practically all respects, similar to case under consideration, and was determined upon a motion to dismiss wherein the grounds for dismissal urged were:

"It plainly appears from the bill and exhibits filed therewith that this suit is one involving substantial property rights and interests of the United States Government, and therefore while

nominally a suit against the individual defendants, is, in fact, one against the United States.

"That the same is prosecuted without the consent of the United States.

"The bill is one for an injunction only and no other relief is specifically prayed for in the bill."

In that case complainant secured a restraining order and a mandatory order to restore the property already taken.

The defendants, officers of the War Department, were operating under an order of the President of the United States and the Secretary of War and proceeded to seize the goods by force of arms, without giving the complainant an opportunity to be heard—and seized the property before the restraining order could be issued.

The Court, in overruling said motion, said:

"Upon considering the matters thus far involved in this suit, I am confronted with Article 5 of the Constitution of the United States, wherein it states:

"No person shall * * * be deprived of life, liberty or property without due process of law. * * *"

And again:

"Is the citizen to be denied his right of intervention and protection from the judiciary solely because the President has signed a paper that would strike down the claimed vested legal property rights of a citizen?

"Can contracts alleged to have been legally

entered into between citizens and duly authorized representatives of the Government be declared void by the President without resort to the judiciary and an opportunity being given those claiming vested rights thereunder to be heard?

“I do not think so.”

This is Not a Suit Against the United States.

In the Shipping Board cases, 258 U. S. 549, the Court, through Justice Holmes, said (after reciting the facts that the contracts were made for and in behalf of the United States—and the relief sought in equity was to restore certain property to complainants which had been taken by defendants and to cancel contract substituted by defendant for the original contract):

“They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the

power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts. * * *

"The plaintiffs are not suing the United States but the Fleet Corporation; and if its acts was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred. * * *

"We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation, 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect."

The leading authority in support of this proposition that this is not a suit against the United States is the noted—much quoted—case of *United States v. Lee*, 106 U. S. 196. The Lee case was an action by plaintiff against certain officers of the Government to recover land held by the Government, and devoted to public uses, as "Arlington Cemetery." In that case—as in this—the Attorney General filed a "suggestion" that the cause was against the United States. And he "moved that the declaration in the suit be set aside, and all the proceedings be stayed and dismissed, and

for such other order as may be proper in the premises."

Mr. Justice Miller, in that case, wrote a powerful opinion, which has been followed as the law ever since in a large number of cases, and has never been overruled. In setting forth the fundamental principles—which are as applicable to the case at bar—he said:

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?"

Again he said:

"Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights. * * *

"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case

of Carr v. United States, already referred to, the Government is always to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."

This Court affirmed the judgment of the court below in favor of the plaintiff.

Among the many cases in which the case of United States v. Lee, *supra*, has been cited are the following:

- In re* Ayres, 123 U. S. 443, *l. c.* 501;
- Stanley v. Schwalby, 147 U. S. 508, *l. c.* 518, also
523, dissenting opinion of Field, J.;
- Belknap v. Schild, 161 U. S. 10, *l. c.* 19;
- Tindal v. Wesley, 167 U. S. 204, *l. c.* 213;
- Wadsworth v. Boysen, 148 Fed. 771, *l. c.* 780;
- Ex parte* Young, 208 U. S. 123, *l. c.* 151;
- Philadelphia v. Stimson, 223 U. S. 605, *l. c.* 619;
- Louisiana v. McAdoo, 234 U. S. 627, *l. c.* 629;
- McComb v. U. S. Housing Corp., 264 Fed. 589,
l. c. 592;
- Muenster v. Meredith, 264 Fed. 243, *l. c.* 246;
- Walker v. Ford, 269 Fed. 877, *l. c.* 178;
- The Pesaro, 255 U. S. 216, *l. c.* 219;
- The Pesaro, 277 Fed. 473, *l. c.* 475;
- Sloan Shipyards Corp. v. U. S. Shipping Board,
258 U. S. 549, *l. c.* 567;
- Mfrs. L. & Imp. Co. v. U. S. Board E. F. Corp.,
284 Fed. 231, *l. c.* 234.

THE RIGHT TO INJUNCTION AGAINST OFFICERS.

The right to enjoin officers of the State in a matter which directly affects the State, and its powers, was early decided by the Supreme Court of the United States in *Osborn v. The Bank of the United States*, 9 Wheat. 738. This is a leading case, and has been frequently cited with approval and followed. The opinion was by Chief Justice Marshall and is a familiar one in the political and judicial history of the country.

The Court below had compelled by injunction the repayment to the Bank of the United States by the auditor of the State of Ohio, of \$100,000 which had been collected as a tax on the Bank imposed under a law of the State of Ohio—a mandatory injunction, and the Supreme Court affirmed it. (A discussion of this phase of the case will be found on pages 838 *et seq.*)

Injunction will go against Cabinet officers, for an abuse or excess of their lawful powers.

Noble v. Union River Logging Railroad Co., 147 U. S. 165.

Injunction against the Secretary of the Interior. *Philadelphia Co. v. Stimson*, 223 U. S. 605.

Injunction against the Secretary of War. *Lane v. Watts*, 234 U. S. 525.

Injunction against the Secretary of the Interior.

An early case, often cited, is *Noble v. Union River L. R. Co.*, 147 U. S. 165. Mr. Justice Brown delivered the opinion.

“This was a bill in equity by the Union River

Logging Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an Act of Congress." * * *

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a *mandamus* if he refused to do an act which the law plainly required him to do." * * *

"It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the court must, therefore, be affirmed."

The same rule is laid down in *Philadelphia v. Stimson*, 223 U. S. 605. In this case, though the plaintiff was denied his claim on the facts pleaded, the right to bring the proceedings against the Secretary of War was fully sustained, and the suit by way of injunction against the Secretary of War was held to be *in personam*, and was not against the United States.

"Appeal from the Court of Appeals of the District of Columbia to review a decree affirming a decree of the Supreme Court of the District, sustaining a demurrer to a bill to set aside certain

harbor lines so far as they encroach on complainant's land, and to restrain the Secretary of War from causing threatened criminal proceedings to be instituted against complainant for reclamation and occupation of land outside of the prescribed limits.

Affirmed.

The defendant, (Secretary of War) made the point among others:

"1. This proceeding is virtually a suit against the United States."

Opinion by Mr. Justice Hughes, beginning p. 613, on page 619, the court said:

"First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Citing many cases.) And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn v. Hank of United States*, 9 Wheat. 738, 843, 868, (and many other authorities.) And it is equally applicable to a Federal Officer acting in excess of his authority or under an authority not validly conferred. (Citing cases.)

So also,—*Lane v. Watts*, 234 U. S. 525. Appeal from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws.

Mr. Justice McKenna, delivering the opinion of the Court, said:

“The title having passed by the location of the grant and the approval of it, the title could not be subsequently invested by the officers of the Land Department. *Ballinger v. United States*, 215 U. S. 240. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined. *Noble v. Union River Logging R. Co.*, 147 U. S. 165. *Philadelphia Co. v. Stimson*, 223 U. S. 605. The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of the appellees.

“This disposes of the contentions of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial a title to land not situated within the jurisdiction of the court ‘wherein an essential party not present in the forum and is not even suable,—the United States.’ ”

In *Payne v. Central Pac. Ry. Co.*, 255 U. S. 288, Mr. Justice Van Devanter, delivered the opinion of the Court; *l. c.* 231.:

"This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial Court dismissed the bill and the Court of Appeals reversed that decree and directed that an injunction issue. 46 App. D. C. 374. An appeal under p. 250, par. 6, of the Judicial Code brings the case here."

After a discussion of the case (*Quod vide*), the Court continues, *l. c.* 238:

"We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. *Ballinger v. Frost*, 216 U. S. 240; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620; *Lane v. Watts*, 234 U. S. 525, 540."

The foregoing precedents are again followed in an injunction suit against a United States Marshal; see—*Loisel v. Mortimer*, 277 Fed. 882, Circuit Court of Appeals, Fifth Circuit.

From an order granting a preliminary injunction the defendant appealed. Affirmed. Citing: *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 238; *Lane v. Watts*, 234 U. S. 525, 540; and *Noble v. Union River L. R. R. Co.*, 147 U. S. 165, 176.

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The power of the Postmaster General was checked by an injunction in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. In that case, Mr. Justice Peckham applied the rule of law as follows, p. 110:

“The Postmaster General’s order, being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto, until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, **yet such decision, being a legal error, does not bind the courts.**”

Wadsworth v. Boysen, 148 Fed. 771 (Nov. 23, 1906), C. C. A., 8th Circuit, was a suit to enjoin an Indian Agent from obstructing plaintiff from prospecting for the purpose of selecting mineral lands thereon. Demurrer to bill overruled. Temporary injunction granted—on appeal—affirmed.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

The opinion by Philips, District Judge, after citing

authorities, affecting the title to land, notably *Minnesota v. Hitchcock*, 185 U. S. 377, draws the distinction between cases, and cites most of the leading cases, *contra*, as follows:

“The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in *Noble v. Union River Logging Railroad*, 147 U. S. 172:

“‘If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a *mandamus* if he refused to do an act which the law plainly required him to do.’ ”

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, before Sanborn and Smith, Circuit Judges, and Trieber, District Judge, was an appeal from the District Court for the District of South Dakota. The suit was by the Belle Fourche Valley Water Users' Association against Frank C. Magruder and others. From an order refusing to set aside a restraining order and granting an interlocutory injunction, defendants appeal. Opinion by Sanborn, Circuit Judge, p. 74 *et seq.*

“(3) Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against

their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts.

* * * * *

If the averments of the complainant are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. **They are, therefore, not the acts of the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts."**

In closing his opinion Judge Sanborn says, p. 82:

"(6) **The controlling reason** for the existence of the right to issue an interlocutory injunction is that the Court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before these claims can be investigated and adjudicated.

"A preliminary injunction maintaining the existing situation may properly issue whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be certain, great, and irreparable if the motion is denied, while the loss and inconvenience to the opposing party will be inconsiderable."

The very latest case in point of time, and one almost identical with the case at bar, is *United States Harness Co. v. Graham, et al.*, in the District Court of the U. S. for the N. Dist. of West Va. (*Supra.*)

THE UNITED STATES A TRADER; NOT A GOVERNMENT.

In the case of *South Carolina v. United States*, 199 U. S. 43, Mr. Justice Brewer makes some pertinent contrasts—applicable to the case at bar—between the exercise of governmental functions and functions of a private nature in which the State, the Government, engages as a business.

To like effect is the language of Chief Justice Marshall in *Bank of U. S. v. Planter's Bank of Georgia*, 9 Wheat. 904, where he said:

“ ‘It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that Company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.’ ”

These words are quoted and followed in many cases; *e. g.*

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Ky., 11 Peters 256, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
Panama R. R. v. Curran, 256 Fed. 772.
(C. C. A.)

Lord & Burnham v. U. S. S. B. E. F. C. (D. C.)
256 Fed. 957.

And see

The *Pesaro*, 277 Fed. 473 (D. C.) (December 13, 1921.)

To these adjudicated cases, add the language, in the same spirit, in the statute from which alone the Defendant John W. Weeks, as Secretary of War, derives his authority in this case; that is to say: The operation of the transportation facilities under the Secretary of War is to be "in the same manner and to the same extent as if such transportation facilities were privately owned and operated."

Sec. 201 (e) of the Transportation Act of 1920 is as follows:

"(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the 'Shipping Act, 1916,' as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein."

DEFENDANTS' AUTHORITIES.

The authorities cited by the defendants in their brief do not reach the gravamen of this case. Most of them

are cases in which the only question was the divesting of title to land or other property out of the United States; the title to which was in the United States.

Whether the contracts which are copied in full in the bill in this case, are or are not to be considered for all purposes as contracts with the United States, the fact remains that the subject matter of said contracts related to the carrying on of a private business venture for a profit, in which the United States was a "partner," within the meaning of Chief Justice Marshall in the case of

Bank of U. S. v. Planters Bank of Ga., 9 Wheat
904.

and the numerous cases which followed it, and are cited elsewhere in this brief.

And the United States was acting as a "Trader," and not in a "Governmental" capacity.

South Carolina v. U. S., 199 U. S. 43 (1905).

If the defendants combined together, and threatened to take away by force from the plaintiff the only property with which that partnership could be carried forward, etc., injunction is the only remedy.

We print in the Addenda the opinion rendered by the respondent, Honorable Charles B. Faris, Judge of the District Court, on the motion of the Government and of the defendants, to dismiss the cause on the ground that it was a suit against the Government. This opinion was rendered after the motion had been fully argued and briefed. We are submitting it not only because it fully answers the argument of the Petitioner, but also because it shows the Court's theory on which the point was decided.

CONCLUSION.

The attitude of the Government is rather inconsistent. Its law, under the Constitution, is the supreme law of the land and it expects and exacts the most scrupulous respect for it under severe penalties. Now here we have an army officer, Col. T. Q. Ashburn, directly violating his orders, committing a trespass and depriving a citizen, who has contracted in good faith with Government officials, of his property and rights, this in direct violation of the Constitution.

Col. Ashburn's orders were, in the event Mr. Goltra declined to surrender the towboats and barges, to "apply to the United States District Attorney at St. Louis REQUESTING THE INSTITUTION OF LEGAL PROCEEDINGS FOR THE RECOVERY OF SAID PROPERTY." Up to this point some regard seems to have been had for law by the Government officials, but that disappeared when the army officer, accompanied by a large force of men, took violent and forcible possession of the property, depriving the complainant of his day in court and of his property without due process of law.

If the officials of the United States Government demand respect for the law and require obedience, how can they expect such when they themselves have no respect for it? It is a dangerous thing for this Government to decide matters of private right with an army colonel and a force of men.

And now that the complainant has thwarted the il-

legal act, confessedly one in which the defendants had a guilty knowledge, else they would not have selected Sunday for it, a day when it might be thought impossible for the court to act, the Government itself comes into this Honorable Court and seeks its aid in preventing a hearing of the complainant's cause of action before one of its own courts. Thus it asks this Honorable Court its writ of prohibition to make sure that the original wrongful act of Col. Ashburn and the other defendants shall be successful and that the army of the United States, and not the courts, shall decide the rights of property of citizens in time of peace, a thing we feel sure this Honorable Court will refuse to do.

One thought more. Should the Government officials be successful in this proceeding what faith can its citizens have in its contracts in the future? Will any citizen rely upon written promises of the United States Government if they can be violated by its army without a moment's notice?

If there ever was a case which required a court of equity to act to prevent such usurpation of authority of which these defendants have been guilty, this is one. The acts of Secretary Weeks and Col. Ashburn together with the connivance of the United States District Attorney, was a tyrannical use of the military power of this Government. This same branch attempted the same methods in the United States Harness case and was thwarted there. If such acts, of which these men have been guilty, are permitted to go unchallenged, this country will be in no position to complain of the militaristic government of our late enemy, the German Empire.

We most respectfully ask that the preliminary writ be quashed and the petition for a writ of prohibition be denied.

Respectfully submitted,

Jos. J. Davis
Amasa W. Roberts
Chas. C. English Allen
Attorneys for Respondents.

ADDENDA.

DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE EASTERN DIVISION
OF THE EASTERN JUDICIAL
DISTRICT OF MISSOURI.

EDWARD F. GOLTRA,

Plaintiff,

VS.

WEEKS, ET AL.,

Defendants.

} No. 6639
} In Equity.

FARIS, J.

**ORAL OPINION OF THE COURT ON MOTION TO
DISMISS BILL.**

Plaintiff entered into a charter-party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four towboats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter-party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have

been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the defendants in the manner hereinafter more specifically set out.

The parties to this lease or charter-party are recited in the instrument thus:

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part.”

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employees of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be

taken from him without due process of law, and without any process of law whatever, and in contravention of the charter-party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn and Carroll, as District Attorney of the United States (the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for non-compliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such non-compliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that

not only does the language of the charter-party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter-party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter-party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter-party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in

Court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter-party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emergency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a *quasi* private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 566).

By the act of Congress of June 5, 1920 (41 Stat. 988) the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships

and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes and existing contracts about them had placed such custody and control.

For the Act of June 5, 1920, excepted these vessels from the transfer to the Shipping Board by a proviso to Section 4 of said Act, which proviso reads:

“Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this Act.”

Since the vessels in dispute were not only “vessels assigned to inland waterways,” but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War De-

partment, to plaintiff here; for, on the second of the above propositions the bill before me says:

“These vessels were not completed until long after said date (that is to say, May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922.”

Whether this allegation is true or not, does not, of course, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and control in the War Department arose solely by reason of the fact that the \$3,860,000.00 with which they were constructed, had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was subordinate to, and acted under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act, of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter Act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the pro-

visions of Paragraph 4, Section 6, of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by Section 6, *supra*, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said Section 201, which reads thus:

“Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.”

A further provision of said Section 201 of the Transportation Act, contained in clause (e) thereof provided, that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities, affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly

limits the laws, regulations and liabilities to admiralty laws and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525) whereby, *inter alia*, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or *in rem*.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control, of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific application of clause (d) of Section 201, *supra*, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt, that the United States is the beneficial owner of them. It owns them because it owned, and now owns, all of the capital stock of the

Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation, which the latter ever used or ever had. But, in a sense, the United States was a *cestui que trust* of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a *quasi* private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to pre-war normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

(a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation.

(b) That the said Fleet Corporation was a *quasi* private corporation, in which all of the capital stock was owned by the United States;

(c) That all of the money with which the Fleet Corporation operated, came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the reve-

nues of the United States, by the Act of March 1, 1918 (40 Stat. 438) or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels, was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shall have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent. (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549).

This case here at bar, it is true, is not an action

against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of *Wells v. Roper*, 246 U. S. 355; *Oregon v. Hitchcock*, 202 U. S., 60; *Nogamat v. Hitchcock*, 202 U. S., 473; *Stanley v. Schwalby*, 162 U. S., 255; *Louisiana v. Garfield*, 211 U. S., 70; *Louisiana v. McAdoo*, 234 U. S., 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (*vide*, *The Siren*, 7 Wall. 152) captured by it in War, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and post-roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of *Kaufman v. Lee*, 106 U. S., 196, wherein suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way

as a military reservation, and *Stanley v. Schwalby*, 162 U. S., 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true, the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps subsists. The difference between the two cases, as they are distinguished by the Supreme Court in the *Stanley* case, is that in the *Lee* case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the *Stanley* case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no Court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after all is said, is the only subject of a lawsuit.

But the *Lee* case, *supra*, (*Kaufman*, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to

the jurisdiction of the trial Court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion, that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Shipyards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law, and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant, Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secretary of War, would have constituted that due process of law, which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case, particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case, in this pertinent and apposite language:

"No man," said Mr. Justice Miller, "in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound

to submit to the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this Court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of a Government without lawful authority, without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty, and the protection of personal rights.”

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly no Government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by

those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter-party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately, at least, countenanced only lawful re-possession, the presumption ought to be entertained, that the acts of defendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive, that a similar view, in a very similar case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this government, these alone ought to suffice.

Without more, I am of the opinion, that the motion to dismiss on the grounds now urged by defendants, ought to be overruled, and so it will be ordered.

April 30, 1923.

St. Louis, Missouri.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA.

UNITED STATES HARNESS
COMPANY, A CORPORATION,

Against

W. A. GRAHAM, F. F.
SCHOWDEN AND JAMES
R. SHEPHERD, JR.

} In Equity

BAKER, J.

This is a suit instituted in the Circuit Court of Jefferson County, by United States Harness Company v. W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., alleging that on September 24, 1920, plaintiff entered into a contract with the Government of the United States of America, acting by and through E. C. Morse, Director of Sales, Supply Division, General Staff, he being then and there contracting officer on behalf of the Government, acting by and under the authority of the Secretary of War, for the sale of certain harness, saddles, leather, spare parts for harness and saddles, hardware and accessories, cut leather stock, etc., fully set out and enumerated in contract filed as "Exhibit A" with plaintiff's bill. And on December 9, 1920, two supplementary contracts were entered into by and between said parties, copies of which

said supplementary contracts are filed as "Exhibits B and C" with plaintiff's bill, whereby certain other harness and other equipment was sold to the plaintiffs by the United States of America by and through said E. C. Morse, Director of Sales.

Pursuant to said contracts plaintiff proceeded to conduct the business covered thereby, receiving from time to time goods and property from the Government at its factories at Ransom, in Jefferson County, and proceeded to remanufacture and make suitable for commercial and industrial purposes such parts thereof as required such remanufacture, and to sell the same to various parties at various places throughout the United States.

Complainant alleges that in conducting said business it has accounted for regularly to the Government, and paid over to it, all money to which the Government has been entitled under the terms of said contract, and has, in all respects and at all times, fully and completely performed its part of said contract.

Complainant further alleges that on June 14, 1921, the President of the United States signed an order declaring void the same contract, without giving it an opportunity to be heard and without assigning any sufficient reason for said action, which said order is in words and figures following:

THE WHITE HOUSE.

"By virtue of the power vested in me, I hereby declare void, the contract of September 24, 1920, and the two contracts of December 9, 1920, between the Director of Sales of the War Department and the United States Harness Company.

(Signed) Warren G. Harding."

That pursuant to said executive order, Hon. John W. Weeks, Secretary of War of the United States of America, issued the following order:

“Lt. Col. Wm. A. Graham, July 14, 1921.
Judge Advocate General’s Office,
Washington, D. C.

You will proceed to Ransom, W. Va., at which place is located the plant of the United States Harness Company. Upon arrival at that place you, in company with a representative of the Department of Justice and an officer of the Quartermaster Corps, will, **in the name and by the authority of the President of the United States, demand from the United States Harness Company, immediate possession of certain property of the United States** now located upon the premises of said company, being property involved in the three certain alleged contracts between the Director of Sales of the War Department and the said Harness Company, one being dated September 24, 1920, and two dated December 9, 1920, which said alleged contracts were, on the 14th day of June, 1921, declared void by the President of the United States.

“Upon such demand the officer of the Quartermaster Corps will immediately, unless opposed by force of legal process, take physical possession of said property for and in the name of the United States, and at once remove the same from the premises of the United States Harness Company by causing the same to be loaded into trucks or other vehicles of the United States, to be furnished for that purpose.

“By direction of the President.

(Signed) John W. Weeks,
Secretary of War.”

That on the 15th day of July, 1921, the said W. A. Graham, Lt. Col. of the Judge Advocate General's Office of the United States Army, F. F. Schowden, being a major in the Quartermaster Corps of the United States Army, and James R. Shepherd, Jr., being an employee and representative of the Department of Justice of the United States Government, accompanied by numerous soldiers, arrived at complainant's factory at Ransom and entered, unlawfully, upon the property of complainant, and announced that they would proceed to enter upon complainant's property and all parts thereof against its protest. And proceeded to take possession of and move away property and goods of great value, which complainant alleged it had lawfully in its possession under said contract with the United States Government, and which was delivered to it by the United States Government in pursuance to said contracts. And which complainant had stored on its premises awaiting remanufacture or sale in its present condition, in pursuance to said contracts.

That said representatives of the United States Government, and soldiers under their orders, unlawfully entered upon complainant's premises and threatened to, and actually did, take possession of said property and goods and interfered with complainant's business in all other respects, bringing unfair disrepute upon its good name and destroying the good will of its customers, all which was irreparable loss and injury to complainant.

That complainant protested against the action of said defendants and ordered them off its premises, but said defendants, by virtue of the force of armed men, disregarded complainant's protests and order.

Complainant further alleges that it is advised and believes that the order of the President of the United States aforesaid, dated June 14, 1921, was made without constitutional authority on the part of the President and is illegal and void; that the United States Government is bound by said contracts and cannot avoid or evade the same without depriving complainant of its vested rights under the Constitution and Laws of the United States.

Complainant prays that an injunction be issued at once against the said defendants restraining and prohibiting them, either themselves or any soldiers or agents acting under their orders, from entering upon its premises and from remaining thereon, and restraining and preventing them from interfering with taking possession of any property upon complainant's premises or in its lawful possession. And further restraining and prohibiting them from retaining or removing beyond the limits of Jefferson County any such property which they already had removed from complainant's premises, and for such further and general relief as to equity shall seem meet.

On July 15, 1921, J. M. Woods, Esq., Judge of the Circuit Court of Jefferson County, West Virginia, granted the injunction as prayed for in said bill and enjoined and prohibited, until further order of the Court, W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., either themselves or by soldiers or agents or employes acting for or under them, from entering upon the premises of said United States Harness Company in said Jefferson County and from interfering with or taking possession of any property on said premises or elsewhere in the possession of the

United States Harness Company, and from remaining upon said premises and from retaining possession or removing outside the limits of Jefferson County any property already taken from said United States Harness Company before the service of said order.

Said injunction order further provided that before it should be effective, plaintiff should give bond before the Clerk of the Circuit Court of Jefferson County in the sum of \$2,500.00, conditioned according to law, with security to be approved by the Clerk. Bond was immediately given as provided by said order, and said injunction order was served upon F. F. Schowden and James R. Shepherd, Jr., by delivering to each of them in person, in Jefferson County, a true copy thereof on July 15, 1921, at four (4) o'clock P. M., the said W. A. Graham not being found in said county.

On July 21, 1921, the United States of America through Stuart W. Walker, District Attorney for the Northern District of West Virginia, served notice on the complainant United States Harness Company that on the 23rd day of July he would move the Judge of the Circuit Court of Jefferson County, in vacation, for an order removing said cause to the District Court of the United States for the Northern District of West Virginia.

On July 23, 1921, petition for removal was regularly filed and motion made for removal of said cause to the United States District Court for the Northern District of West Virginia, copy of President's order being filed with said petition for removal marked "Exhibit A" and copy of order of Honorable John W. Weeks, Secretary of War, directed to Lt. Col. W. A. Graham,

dated July 14, 1921, was duly filed with said petition marked "Exhibit No. 2."

Upon consideration of said petition and motion, the Circuit Court of Jefferson County entered an order removing said cause to the District Court of the United States for the Northern District of West Virginia.

On July 27, 1921, Stuart W. Walker, Esq., United States Attorney for the Northern District of West Virginia, and as such attorney for the defendants, served notice upon complainant that on the 2d day of August, 1921, at ten o'clock, A. M. or soon thereafter, he would move the Judge of the United States District Court for the Northern District of West Virginia, at the Government Court Room in Martinsburg, West Virginia, to dissolve the injunction previously entered in the cause of the United States Harness Company v. W. A. Graham and others, and to dismiss said cause, for the reason that said suit is in effect one against the United States and involves the property rights of the United States, and for other reasons apparent upon the face of the bill and exhibits therewith filed.

On August 2, 1921, at the Government building in Martinsburg, pursuant to said notice motion was made by W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., defendants, by Stuart W. Walker, United States Attorney, and as such attorney for defendants, to dismiss this cause for the reason that the averments of the bill do not constitute such facts as show a valid cause in equity and for the following reasons:

1. It plainly appears from the bill and exhibits filed therewith that this suit is one involving substantial

property rights and interests of the United States Government, and therefore while nominally a suit against the individual defendants, is in fact one against the United States.

2. That the same is prosecuted without the consent of the United States.

3. There is no allegation of fact in the bill sufficient to constitute a cause of action against the United States.

4. The bill is one for an injunction only and no other relief is specifically prayed for in the bill.

5. The suit is a subterfuge as one against the defendants individually in an effort to give jurisdiction to this Court, which would not have jurisdiction of the suit if it were instituted directly against the Government.

6. This Court is wholly without jurisdiction to entertain the suit.

Said motion was exhaustively argued by counsel for both plaintiff and defendants, and briefs filed.

CONSIDERATION OF CASE.

Upon considering the matters thus far involved in this suit, I am confronted with Article 5 of the Constitution of the United States, wherein it states:

“No person shall * * * be deprived of life, liberty or property, without due process of law * * *”

In construing the meaning and extent of protection under this provision of the Constitution against action without due process of law, it has always been recognized that one who has acquired rights by administrative or judicial proceedings cannot be deprived of them without notice and opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law.

It is unnecessary to recite the decisions in which this principle has been repeatedly recognized.

It is enough to say that its binding obligation has never been questioned by the highest court in our land.

Note the President's order: "By virtue of the power vested in me, I hereby declare void the contract of September 24, 1920, between the Director of Sales of the War Department and the United States Harness Company. (Signed) Warren G. Harding."

Also note the language of the order executed by John W. Weeks, Secretary of War, directed to Lt. Col. Wm. A. Graham, Judge Advocate:

"You will proceed to Ransom, W. Va., at which place is located the plant of the United States Harness Company. Upon arrival at that place, you, in company with a representative of the Department of Justice and an officer of the Quartermaster Corps, will, in the name and by the authority of the President of the United States, demand from the United States Harness Company immediate possession of certain property of the

United States now located upon the premises of said company, being property involved in the three certain alleged contracts between the Director of Sales of the War Department and the said Harness Company, one being dated September 24, 1920, and two dated December 9, 1920 which said alleged contracts were, on the 14th day of June, 1921, declared void by the President of the United States.

Upon such demand the officer of the Quartermaster Corps will immediately, unless opposed by force of legal process, take physical possession of said property for and in the name of the United States, and at once remove the same from the premises of the United States Harness Company by causing the same to be loaded into trucks or other vehicles of the United States, to be furnished for that purpose.

By direction of the President.

(Signed) John W. Weeks, Secy. of War."

There is no man in all this land, in my opinion, who would more graciously accord to a citizen the right to question, in good faith, the authority of any of his acts, more quickly than President Warren G. Harding. There is no man who would be slower than the President to deny the right of the citizen to seek the protection of Courts against an unlawful invasion of property, even though that invasion was founded upon his own edict. Neither would he criticize any citizen for respectfully, but nevertheless firmly, refusing to bow to the mandate of an unconstitutional or illegal order even though it bore his signature.

“By virtue of the power vested in me, I hereby declare void the contract of September 24, 1920, and the two contracts of December 9, 1920, between the Director of Sales of the War Department and the United States Harness Company.” Is that order a usurpation of that power which is reposed under our Government only in the judicial branch, and never constitutional in the executive branch?

Is the citizen to be denied his right of intervention and protection from the judiciary solely because the President has signed a paper that would strike down the claimed vested legal property rights of a citizen?

Can contracts alleged to have been legally entered into between citizens and duly authorized representatives of the Government be declared void by the President without resort to the judiciary and an opportunity being given those claiming vested rights thereunder to be heard?

I do not think so.

The motion to dissolve the injunction and dismiss this suit must be overruled, under the present state of the pleadings.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETITION OF THE }
United States of America, as owner } No. 23,
of nineteen barges and four towboats. } Original.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The suit sought to be prohibited by this proceeding is one brought by Edward F. Goltra in the District Court of the United States for the Eastern District of Missouri against John W. Weeks, Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States attorney for that district.

Prior to May 28, 1919, the date of the contract in controversy, the United States Shipping Board Emergency Fleet Corporation had allotted, out of funds appropriated to it by the Government, to the Chief of Engineers of the United States Army, \$3,860,000

for a fleet of 4 towboats and 19 barges, for the primary purpose of transporting iron and coal to and from St. Louis, Mo., as an emergency of war then existing. Contracts were let with private parties for the construction of the fleet. Upon the signing of the armistice the emergency passed, at which time the barges were nearing completion, and, in order to utilize them, the boats and barges were let by the contract in controversy to the complainant, Goltra. This contract is set out in extenso in the bill of complaint which forms a part of this record.

The contract is stated therein to be "between the *United States of America*, represented by Maj. Gen. William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War," and *Edward F. Goltra*, of the city of St. Louis. The contract thereupon sets out certain previous relations between the parties, the allotment of the \$3,860,000 for the construction of the towboats and barges, the letting of the contracts for the construction of the barges, the construction of the towboats for the utilization of the barges, and the passing of the emergency of war. The contract thereupon recites that the lessor charters and leases to the lessee the said boats and barges for a term of five (5) years after the delivery of the first barge or towboat to the complainant.

The contract provides that the net earnings, after deducting operating expenses and maintenance, shall be deposited with the Treasurer of the United States to the credit of the Secretary of War until such time

as the net earnings shall equal the full amount of the cost of the vessels, plus interest at 4 per cent.

Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if desired by the lessee, a board of arbitrators to be selected by the parties shall appraise the value of the fleet, and the lessee is given the *right* or option of purchasing the fleet, with respect to which purchase it is provided that if the sums deposited with the Treasurer by the lessee shall equal the full amount of the cost of the vessels, plus interest, the same shall be applied as payment in full for the fleet; any earnings above that amount to belong to the lessee. If the funds are not equal to the cost, plus interest, but are greater than the appraised value, the whole funds shall belong to the United States and the fleet shall thereupon become the property of the lessee. If the funds are less than the appraised value, they shall be applied to the purchase price at the appraised value and the deficiency paid by the lessee to the United States, in which event the fleet is to be his property. In the event that the funds are unequal to the appraised value, the deficiency payments are to be made by the lessee over a period of fifteen (15) years in equal installments, with interest, the title to the property remaining in the United States until the payment of the whole purchase price.

One of the arguments and covenants of the contract is "*that the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries*

for the period of the lease and of any renewals thereof, transporting iron, ore, coal and other commodities"; that the lessee shall pay all operating expenses and maintain the fleet in good operating condition and provide insurance for the benefit of the United States. Various other provisions for the protection of the United States are contained in the lease which are not necessary to the consideration of the question here presented.

Section 8 of the contract is as follows:

The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

On May 15, 1922, the complainant took possession of the boats under the contract.

On March 3, 1923, the Secretary of War served notice upon the complainant that, in his judgment, the complainant had not complied with the terms and conditions of the contract, *in that he had failed to operate the towboats and barges as a common carrier*, declaring that the contract and the supplement

thereto were terminated, and demanding the delivery of the possession of the towboats and barges to the United States. A similar notice (in view of the contention of the complainant that the Chief of Engineers, and not the Secretary of War, had the right to terminate the contract) was signed by Lansing F. Beach, Chief of Engineers, on April 27, 1923, and delivered to Mr. Goltra on April 30, 1923.

On March 25, 1923, the defendant Ashburn, pursuant to instructions from the Secretary of War, took possession of the towboats and barges, as he contends, without violence or show of force, but as complainant contends, otherwise. On the same day the bill of complaint was presented to the Hon. C. B. Faris, judge of the Eastern District of Missouri, and the mandatory and restraining order, set forth in the record herein, was issued and served upon Colonel Ashburn and Mr. Carroll. This order restrained the defendants from interfering with the possession of the complainant and commanded the return of the boats already taken.

Afterwards the appearance of the Secretary of War was entered in the cause.

At all stages of the proceeding the defendants, by motion to dismiss and otherwise, asserted that this proceeding was, in essence and effect, although not nominally, a suit against the United States and its property. The pleadings raising these questions are set forth in the record filed herewith. This contention was denied by the District Court and the motion

to dismiss overruled. A stay of proceedings has been allowed in order to permit the presentation of this petition to this court.

I.

RIGHT TO PROHIBITION.

We shall hereinafter undertake to satisfy the court that if the suit in controversy is in essence and effect one against the United States, then the District Court of the United States is without jurisdiction, and prohibition will lie. Thereafter we hope to demonstrate that the suit is in effect a suit against the United States.

It may be said by opposing counsel that in view of the right to appeal or in error, the discretion of the court should be exercised against the writ. Granting the existence of the right of final review, we say that the right is inadequate to the needs of the situation as here presented, which, with accompanying lack of jurisdiction in the court below, clearly justifies the writ.

The situation brought about by the institution of the suit and the mandatory injunction issued in connection therewith, is such that prohibition is the only remedy which can afford practical relief. The nineteen (19) barges and four (4) towboats, which are the subject matter of this controversy, are without doubt the property of the United States. They were built at an expense of approximately \$3,800,000, all moneys of the United States. They are capable of being used in connection with commerce and trans-

portation upon the Mississippi River, and their construction was initiated and completed with that very purpose in view. The contract in question was expressly made in furtherance of that purpose, and the action taken by the officers of the United States, authorized by the contract itself, was taken because of complainant's failure to attempt to carry out this purpose.

While the boats are still in the possession of the officers of the United States they are, under the orders of the District Court, being held in harbor within the jurisdiction of that court, and so are incapable of being used in commerce and transportation. A motion is pending to require the return of the boats to complainant.

The litigation with respect to the right to cancel the contract with Goltra, unless disposed of in this proceeding, will undoubtedly be carried to the court of final resort by whichever party may lose in the courts below. In the meantime any possession of the boats, either by the United States or by the complainant, will be subjected to the vicissitudes of the litigation, and at any stage of the proceeding their possession may be taken from one party and transferred to the other, as the particular court dealing with the situation may view the right of the controversy.

The character of the use to which the boats are susceptible is such that no practical service can be furnished by them unless the party holding possession has the unquestioned and uninterrupted right of

possession. If the possession is for the time being left in the United States, it, in order to advantageously use the boats, must enter into contracts with shippers looking to their future use, the performance of which contracts may be jeopardized by the loss of that possession and consequent liability for damages to be adjudged in the Court of Claims as for breach of contract.

The same is true with respect to the possession by Mr. Goltra. He would be at all times, until the end of this litigation, in the position of one holding property which could not be adequately and serviceably used. In order to use this property as a common carrier he would have to comply with the regulations of the Interstate Commerce Commission and with the Shipping Act, and be prepared to perform the contracts and the service which he is permitted to make and render. Therefore, so long as this litigation is pending and undetermined, the use of this valuable property, in which the public is interested from the standpoint of service and the Government from that of revenue, is entirely destroyed, no matter in whose possession it may temporarily be placed, the property itself being affected also by the depreciation and injury incident to nonuse. For these reasons we say that there is *no adequate remedy* by appeal, or error, or certiorari, as the very prolongation of the litigation tends to the destruction of its subject matter.

The situation apparent here, resulting in the tying up of the boats, the consequent loss to the United

States of revenues from use, and the loss to the public in the deprivation of the service which they might render, is such that the discretion of the court, if the view obtains that the right is discretionary and not absolute, ought to be exercised favorably to the writ.

Recurring to our first proposition, we say that if the suit is in essence and effect one against the United States, then the District Court is without jurisdiction and prohibition will lie.

The remedy of prohibition is expressly given by section 234 (sec. 1211) of the Judicial Code in matters of admiralty jurisdiction.

Section 262 (sec. 1239) of the Judicial Code provides that:

The Supreme Court and the Circuit Courts of Appeals and the District Courts shall have power to issue all writs not specifically provided for by statute, and which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

Under the authority of this section, the jurisdiction of the Supreme Court to issue writs of prohibition in respect to common law and equity proceedings is sustained.

In *Naganab v. Hitchcock*, 202 U. S. 473, the court in holding that the court below had no jurisdiction of a suit which was against the United States, said:

Without considering whether the courts would have power to control the action of the

Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is *no jurisdiction to entertain this case*. In respect to this question it is on all fours with *State of Oregon v. Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S. 60). * * * Upon the authority of the *Oregon* case we hold that there is *no jurisdiction to maintain the present suit*, and the action of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is *affirmed*.

In *Smith v. Whitney*, 116 U. S. 167, which was not an admiralty proceeding, it was said:

But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right.

In *In re Rice*, 155 U. S. 396 (not an admiralty proceeding), it was said:

Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and

has no other remedy is entitled to a writ of prohibition as a matter of right.

In Matter of Simons, 247 U. S. 231, was an application to this court for mandamus, or, if that be denied, for prohibition, to prohibit the District Court from proceeding with a cause which petitioner claimed had been erroneously transferred from the law side to the equity side of the court. The court held that the District Court had no right or power to transfer the cause from the law to the equity side of the court and that it was immaterial what form of extraordinary remedy was afforded to grant relief, although mandamus was adopted as the remedy in that instance.

The court said:

If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.

In Ex Parte State of New York, 256 U. S. 490, this court, in dealing with a jurisdictional question identical with the one here—that is, lack of jurisdiction because the proceeding was, in effect, a suit essentially, but not formally, against the State, and in which a right of appeal existed—said:

The want of authority in the District Court to entertain these proceedings * * * and the fact that the proceedings are in essence

against the State without its consent is so evident that, instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued, as prayed.

In *In re Railroad Company*, 255 U. S. 273, it was held that prohibition would lie to determine the question of the lower court's jurisdiction to proceed against petitioner in a cause in which petitioner claimed it had not been served with process, although in that particular case the rule was discharged and the petition dismissed because it appeared that the petitioner below had filed certain motions and taken certain other steps in the cause which might have constituted a general appearance, and it was held to be within the province of the District Court to determine whether petitioner had in fact entered its general appearance in the cause despite the fact that it had not been served with process. It was there said:

There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who, at the outset, objected to the jurisdiction, has preserved his rights by appropriate procedure, and has no other remedy.

In *In the Matter of Walter Patterson*, 253 U. S. 300, it was held that this court had jurisdiction by man-

damus or prohibition to determine the power and jurisdiction of the District Court to refer, over petitioner's objection, a cause on the law side of the court to an auditor to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury. The court said:

Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was held in *Ex parte Simons*, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties and the court to the inconvenience that would be raised by a proceeding that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded.

It, therefore, appears that prohibition is the proper remedy for the situation here, whether the writ is viewed as one of right or as dependent upon the discretion of the court, provided the suit is one in essence against the United States.

II.

IS THE SUIT IN QUESTION ONE AGAINST THE UNITED STATES?

No one will deny that a sovereignty such as the United States or the constituent States can not be sued either in its own courts or in the courts of another sovereignty without its consent having been expressly given. So it can not be denied that if the suit, although nominally not against the sovereignty, is so in essence and effect, then such suit can not be maintained. These propositions are supported by abundant authorities, which we will hereafter present. So that the vital consideration is to determine whether or not this suit is one in essence and effect against the United States. That question can best be determined by a consideration of the bill of complaint. Let us proceed to analyze that bill for the purpose of ascertaining just what it is.

In the first place, it will be noted that the three defendants are officials of the United States, impleaded as such. The bill recites, in a preliminary way, the situation antecedent to the making of the contract which is the basis of the suit, and which is set out early in the bill. The contract is between the United States and Edward F. Goltra, and its terms have been sufficiently set forth in our statement.

Paragraph 1 of the contract provides that it is covenanted and agreed between the parties "that the said lessees shall operate as a common carrier the said fleet of three or four towboats and barges upon the

Mississippi River for the period of the lease, or of any renewals thereof, transporting iron, ore, coal, and other commodities."

Paragraph 8 of the contract is as follows:

8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; *and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.*

The bill then sets out a supplementary contract which deals with the contemplated erection of unloading facilities at St. Louis, the details of which are not necessary to be specifically referred to, except that it is provided in substance, as in paragraph 8 of the first contract, that the lessor may retake possession of the unloading facilities as is provided in said paragraph 8 of the first contract with reference to the boats.

The bill then proceeds to allege that after the complainant had taken over said towboats and barges he was interfered with by the officers of the United States, particularly the Secretary of War, in performing the duties and obligations imposed upon him by the said contract, the details of which are not

necessary to specifically narrate, except that it is averred that by the

acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contracts from carrying out the terms and conditions of the said contracts as a common carrier, or as a private carrier, or in any other manner provided by said contracts; and it became and was and is impossible for the plaintiff to so carry out the contracts under the terms and conditions thereof, unless and until the lessor therein, *being the United States*, causes and permits the plaintiff to carry out the conditions of said contracts in manner and form and for the purposes contemplated by said contracts.

Complainant thereupon avers that said contracts constitute in law a contract of charter and lease together with a contract of privilege and option in the complainant to purchase the boats on the terms and conditions therein stated, and that said contract established in the complainant a fixed and definite property right in said towboats and barges, of which the complainant could only be lawfully deprived "by a proceeding in equity for an accounting and a determination by a decree of court of the *lawful interest of each of the parties thereto in the subject matter of said contracts.*"

The bill thereupon alleges that the defendants did, on March 3, 1923, wrongfully and unlawfully undertake to declare said contracts terminated, and did de-

mand from the complainant the immediate possession of the said boats without warrant of law, and threatened to take the same by force, and had actually begun the taking of the same, pursuant to said demand at the time of filing the bill.

The bill thereupon sets forth the notification of date March 3, 1923, of the Secretary of War to the complainant, and the memorandum of the said Secretary of War to the defendant Ashburn.

Following that the bill sets out the reply of the complainant to said communication.

Thereupon the bill charges as follows:

Plaintiff further avers that the United States, *acting through its lawfully authorized representatives*, has not at any time fulfilled the said two contracts of May 28, 1919, and May 27, 1921, by putting the plaintiff into a position or allowing him to take a position where he could carry out the conditions of said contracts, either as a common carrier or as a private carrier under said contract as defined in section 2 (a) of the original contract of May 28, 1919.

Thereupon, the bill alleges the conspiracy between the defendants to deprive the complainant of his property, without due process of law, and the taking possession of the boats.

The prayer of the bill is for a restraining order, without notice, enjoining the defendants from interfering with the possession by the complainant of the boats and barges, commanding them to return those taken and restraining the *defendant Secretary of War*

"from doing any act whatsoever looking to the cancellation or other termination of said contract of May 28, 1919, and said supplemental contract of May 27, 1921, between the United States and said plaintiff," and enjoining the defendant Ashburn from doing any act in aid of the purpose of said Secretary of War to terminate said contracts and from further interfering with the possession by complainant.

The prayer finally concludes with the following:

The plaintiff prays that on final hearing of this cause of action a decree may be entered in favor of the plaintiff and against the defendants and each of them, which *shall determine the rights of plaintiff as set forth herein under said contracts*, and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

This bill is in legal effect one to specifically enforce the contract set forth therein and to restrain the exercise by the opposite party, the United States, of its contractual right to terminate the contract for complainant's failure to perform the very service primarily contemplated by the contract of lease, which service is expressly covenanted to be performed by the lessee, for the reason that the conditions justifying the termination of the contract did not exist, inasmuch as the lessee's failure to perform was occasioned by acts of noncooperation or of frustration on the part of the United States. In other words, the bill proceeds upon the theory not that the *right* to declare the contract terminated did not

exist at all, but that a state of fact from which the right might arise did not exist, as had been so determined by the Secretary of War, thereby putting in issue the soundness of the conclusions of the Secretary of War in the exercise of his discretion and judgment upon questions of fact.

That this is the position of the complainant and of his bill is evidenced by the following allegations:

And said contracts established in the plaintiff, by virtue of their terms and conditions and of the considerations moving the plaintiff and the United States thereunto, a fixed and definite property right in said towboats and barges and in said unloading facilities and in the land on which said unloading facilities were constructed, of which rights, respectively, the plaintiff could not be lawfully deprived, except by a proceeding in equity for an accounting and a determination by a decree of court of the lawful interest of each of the parties thereto in the subject matter of said contracts. And the plaintiff avers that notwithstanding such rights in the plaintiff, the defendant, John W. Weeks, *purporting to act as Secretary of War of the United States*, and the defendants, Col. T. Q. Ashburn, *purporting to act as Chief of Inland and Coastwise Service*, and the defendant, James E. Carroll, *purporting to act as United States district attorney for the Eastern Division of Missouri*, acting each for himself and in combination one with another, on or about the 3d day of March, 1923, and thereafter *did wrongfully and unlawfully undertake to declare said contracts terminated and*

did demand from the plaintiff the immediate possession of the said boats without warrant of law and did wrongfully and unlawfully and arbitrarily threaten to take by force the said towboats and barges and unloading facilities described in said two contracts and did cause to be begun the actual seizure of some of said towboats and barges by persons pretending and *purporting to represent the United States and acting under instructions of the said defendants herein.*

It is also evidenced by the complainant's reply to the Secretary of War's demand for the possession of the boats which, not denying the contract *right to terminate the contract*, says:

The exercise of your judgment is, I am convinced, based upon the inadequate and inaccurate information, and has, in fact, no substantial basis upon which to rest:

That the courts will not interfere with the exercise of the judgment and discretion of officers of a sovereignty is well settled in the decisions of this court.

In *Louisiana v. McAdoo, Secretary of the Treasury*, 234 U. S. 633, this court said:

There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is

one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution.

So, too, in the recent case of *Wells v. Roper*, 246 U. S. 335 (of which we shall have more to say hereafter), in dealing with the question of its right to review the exercise of judgment and discretion conferred upon an official, not by law, but by *contract*, as in this case, this court said:

It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding for the purposes of the argument, that *the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.*

When the allegations of the bill in this case are considered with any care, it is obvious that it is not one to restrain officious, unauthorized intermeddlers, acting entirely without authority, from interfering with complainant's rights by the unlawful seizure of

his property, and, as such, against them individually, but in essence it is one to prevent or review the exercise of official discretion by officers because of the existence of facts which did not, as claimed, justify it as exercised.

The final decree, if one be passed in this case, would be to declare the right of the complainant to the avails of the contract; that is, the possession and the right to operate the boats, and to restrain the defendants as officers from declaring a forfeiture and retaking possession of the boats, as is provided in the contract.

If the contracting parties in this case were Mr. Goltra and the corporate owner of these boats, and the defendants were the officers and agents of the corporate owner, could it for a moment be said that a bill of this sort would lie without making the corporate owner a party? The answer is obvious, because the bill would be one to specifically perform a contract and to adjudicate the lack of right and power to terminate it, which relief could only be had against the other party to the contract. So we say in this case that the United States, as owner, is a necessary and indispensable party to this bill, for that the relief sought is in effect a decree against it, and not against the individual or official defendants.

The defendant officers have no interest in the subject matter of the contract or in the controversy, except as their duty may require them as representatives of the Government to exercise discretion

under the contract. In the exercise of this discretion they act for the United States. The United States could only exercise its right of cancellation through its proper officers, and its exercise being a matter of discretion and not a mere ministerial act, it is the act of the United States and not subject to review by the courts.

If the lessor were an individual or private corporation, and a situation arose as here, the lessor would be a necessary party, and the decree would be primarily against it, and incidentally only against its agents. The lessor here being the Government can not be made a party defendant, and yet the decree would operate against and bind it as fully as if it were, for those who alone may act for it are bound, and so it is bound. A contract right belonging to the Government with respect to its own property, necessarily by reason of its movable character always in possession of human agencies, would be denied in a proceeding to which it is not a party. Such a result could only be where it in essence is a party.

THE DECISIONS.

The cases dealing with the question as to whether or not suits against officers of a State, or the United States, are, in effect, suits against the sovereignties themselves, seem to classify themselves under three heads:

(1) Those holding that suits to enjoin the performance of official or discretionary duties of officers and agents of the sovereignty are, in effect, suits

against the sovereignty and can not be maintained without its express consent.

(2) Suits involving property rights of the sovereignty which can not be maintained without such consent.

(3) Suits affecting actions of officers and agents of the sovereignty when such actions are illegal, arbitrary, purely ministerial or otherwise in excess of authority, which are not, in effect, suits against the sovereignty.

It is our contention that this proceeding comes within one or the other, or both, of these first two classifications.

In *Hagood v. Southern*, 117 U. S. 52, the State of South Carolina issued bonds which provided that they should be receivable in payment of taxes. It was also provided in the act authorizing the issuance of these bonds that an annual tax of 3 mills for every dollar of taxable property should be levied to secure the redemption of such bonds. Subsequently the State repealed the act for the levy of a tax of 3 mills for the redemption of such bonds and enacted a statute providing that such bonds should not be receivable in payment of taxes. The plaintiffs as owners of these bonds thereupon instituted suit against defendants as officials of the State to compel them to levy the 3-mill tax for the redemption of these bonds and to accept the same in payment of taxes. The court held that the suit could not be maintained because it was, in effect, a suit against

the State of South Carolina, which had not given its consent to be sued.

The court said (l. c. 67):

These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the eleventh amendment to the Constitution of the United States.

* * * * *

If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding?

In re Ayers, 123 U. S. 443.

The State of Virginia issued bonds in which it was provided that the coupons thereto should be receivable by the State in payment of taxes. The plaintiffs were the purchasers of a large number of these bonds, some of which they sold to residents of the State at discount, to be used by the purchasers in payment of their taxes. Shortly after the purchase of these bonds the State of Virginia passed an act prescribing certain conditions which should be complied with before the coupons on these bonds should be receivable in payment of taxes, which were so

stringent as to nullify, in effect, the provisions of the bonds that the coupons thereto should be receivable in payment of taxes. The plaintiffs thereupon instituted suit to enjoin the attorney general and other officials of the State of Virginia from instituting actions for the collection of taxes against these residents of Virginia who had tendered these coupons in payment of their taxes, asserting, inter alia, that the subsequent conditions imposed by the State as a prerequisite to the right to have these coupons accepted in payment of taxes and the institution by defendants of actions for the recovery of taxes against residents of Virginia, who had tendered coupons in payment of their taxes, would impair the obligation of, and constitute a breach of, the contracts represented by the bonds.

The court held that this suit was against the State of Virginia, and, as that State had not consented to the institution thereof, it could not be maintained.

The court said (l. c. 502):

Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the acts of its General Assembly, referred to in the bill of complaint, there is, nevertheless, no foundation in law for the relief asked. *For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself.* This results from the eleventh amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity

includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought. In *Hagood v. Southern*, 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State," the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State.

* * * * *

But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.

In *Wells v. Roper*, 246 U. S. 335, decided in 1918, the Supreme Court held that where the First Assistant Postmaster General, in accordance with a decision of the Postmaster General, undertook to terminate an existing contract for automobile mail service at Washington, D. C., to make place for a similar service to be conducted by the department under a special appropriation, his action being based upon the supposed authority of the contract itself, and being purely official, discretionary, and within the scope of his duties, a suit to restrain him from annulling the contract and from interfering with its further performance was in effect a suit against the United States and was therefore properly dismissed.

This case is so like the *Goltra* case that we think it advisable to quote at length from the pertinent ex-

pressions of this court upon the question now under consideration (p. 337):

The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.

That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be

taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. *And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.* (See *Noble v. Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap v. Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620.)

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

By Executive order dated March 12, 1919, President Wilson did, in connection with the towboats and barges mentioned in the bill of complaint, "withdraw from the United States Shipping Board such part of the said power and authority so vested in me (him) under said laws with reference to the operation, management, and disposition of vessels as relates to such river barges and towboats, and do (did) hereby delegate to the Secretary of War the

power and authority so withdrawn from the United States Shipping Board, to be by the Secretary of War executed through contract or otherwise, as in his judgment may be most economical and advantageous to the United States."

Such is the authority for the making of the contract involved herein.

It is provided in the Transportation Act of 1920, Title II, section 201 (d), as follows:

Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.

The towboats and barges involved in this controversy are the only facilities within the description of this section, and are the facilities so referred to.

The case of *Wells v. Roper*, 246 U. S. 335, is in our opinion on all fours with this case. The facts in this case are, if anything, stronger than in that. In this case the boats are the property of the United States, and, even if Mr. Goltra should exercise his option, they remain the property of the United States until fully paid for. The right to the cancellation of this contract and to the return of the boats and barges to the United States was a stipulation of the

contract itself. Under this right of cancellation and to retake possession, the Government has taken and is in possession of the boats and barges. The complainant's reply to the Secretary of War set forth in the bill and the whole frame of the bill disclose that the position of the complainant is that the complainant has complied with his contract, and that the *right* to the cancellation of the contract has not accrued. This was the contention of the complainant in the Wells-Roper case, which the Supreme Court met in very apt language in the closing paragraph of its opinion, wherein it says:

And neither the question of official authority, nor that of official discretion, is affected, for present purposes, by assuming or conceding for the purposes of the argument that the proposed action may have been unwarranted by the terms of the contract, and such as to constitute an actionable breach of that contract by the United States.

In *The Siren*, 7 Wall. 152, a boat belonging to the United States collided with and sunk a boat owned by private parties. The court held that a libel in rem against the boat of the United States would not lie without the consent of the Government. It was said (l. c. 153):

It is a familiar doctrine of the common law that the sovereign can not be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public

service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the Nation of the United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States v. Clarke*.

The same exemption from judicial process extends to the property of the United States, and for the same reasons.

* * * * *

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and unavailable for any purpose.

* * * * *

So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the Government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises.

It was held, however, that the rule which precluded a suit against the United States did not apply where the United States itself instituted suit. In such instances it was held that private persons might offset against the claim of the Government any claim which they in turn had against the United States. In this case, the boat in question was a prize of war, and, upon reaching port, a libel in prize was filed against her and she was condemned and sold. It was accordingly held that the parties owning the boat which was sunk had a claim against the proceeds realized from the sale of *The Siren*, on the ground that the institution by the United States of a libel in prize against her was the institution of an action by the United States and was within the qualification or exception to the general rule, and entitled the owner of the sunken ship to damages out of the money realized upon the sale of the boat.

Oregon v. Hitchcock, 202 U. S. 60.

The State of Oregon instituted suit against Hitchcock, Secretary of the Interior, to enjoin him from allotting certain lands to Indians within the limits of the Klamath Reservation in the State of Oregon, which claimed that the land in question was swamp and overflowed land which had been granted by the United States to Oregon upon its admission into the Union, and that the title to such land was therefore in the State. The court held:

1. That while the suit was nominally against the Secretary of the Interior, the United States was the real party in interest, and the suit was in reality against the United States, because the legal title to the land in question was in the United States.

2. That a suit could not be maintained against the United States without its consent.

The court said:

The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock, supra*. There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian Reservation." This suit is brought by a State against the same officers to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

"Now, the legal title to these lands is in the United States. The officers named as defend-

ants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

Naganab v. Hitchcock, 202 U. S. 473.

This was a suit by the plaintiff, a member of the Chippewa Indian Tribe, to enjoin the defendant Hitchcock, Secretary of the Interior, from executing a certain act of Congress, and to compel him to account under the act of January 4, 1889, for the proceeds of the sale of land the title to which was in the Government. The court held that since the title to the lands in question was in the United States, the suit was against the United States, which could not be sued without its consent, and said:

It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no

interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is no justification to entertain this case. In respect to this question it is on all fours with *State of Oregon v. Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S. 60). That case was distinguished from *Minnesota v. Hitchcock*, 185 U. S. 373, relied on here by the appellant, in the fact that in the *Minnesota case* the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians were concerned (act of March 2, 1901, 31 Stat. 950). In this case, as in the *Oregon case*, the the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner its immunity or

consented to be sued concerning the lands in question, and there is no act of Congress in any wise authorizing this action. Upon the authority of the *Oregon case* we hold that there is no jurisdiction to maintain the present suit, and the action of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of the District dismissing the complainant's bill is *affirmed*.

Stanley v. Schwalby, 162 U. S. 255.

This was an action in trespass to try title to certain land occupied by the defendants as officers of the United States. The record title to the land in question was in the United States in fee simple. The plaintiff, on the other hand, claimed title in fee simple to a certain portion of the land by virtue of a prior unrecorded deed from the original owner of the party and asserted that the United States had notice of her prior deed at the time it acquired title to the property. The United States was not formally made a party to the action, but the district attorney, acting under instructions, undertook to intervene in the action as a party defendant.

The court held that as the title to the land was in the United States, the suit, although nominally against the officials of the United States, was in reality against the Government, which could not be maintained without its consent.

The judgments of the courts of the State of Texas appear to have been largely based on *United States v. Lee* (106 U. S. 196), above

cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action, and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers (106 U. S. 199, 206, 222).

* * * * *

In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third,

to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

In *Carr v. United States*, 98 U. S. 433, 437, the court said:

We consider it to be a fundamental principle that the Government can not be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the Government suable in its courts. It is conceded in *The Siren* (7 Wall. 152) and in *The Davis* (10 id. 15) that without an act of Congress no direct proceeding can be instituted against the Government or its property. And in the latter case it is justly observed that "*the possession of the Government can only exist through its officers; using that phase in the sense of any person charged on behalf of the Government with the control of the property, coupled with actual possession.*" If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post office or a custom-house, a prison or a fortification.

* * * *

The cases like *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of Government

property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the Government itself seeks its rights at the hands of the court equity requires that the rights of other parties interested in the subject matter should be protected. *The Siren* was brought into the port of Boston as prize, was libeled, condemned, and sold, and the proceeds paid into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with *The Siren* during her voyage subsequent to the capture. It was held that inasmuch as the United States had resorted to the aid of the court to procure the condemnation of *The Siren*, and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the Government, might well be satisfied out of such proceeds. At the same time it was conceded that neither the Government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some act of Congress (7 Wall. 154). *The Davis* and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The Government appeared as

claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the Government could not be taken out of its own possession by any direct proceeding.

In *Louisiana v. Garfield*, 211 U. S. 70, it was held that a bill brought by the State of Louisiana against Garfield, Secretary of the Interior, to establish title to, and prevent other disposition of, lands claimed under swamp-land grants, was in reality a bill against the United States, which could not be maintained without its consent.

See also, to the same effect, *New Mexico v. Lane*, 243 U. S. 52.

Goldberg v. Daniels, 231 U. S. 218, was a petition in mandamus to compel Daniels, Secretary of the Navy, to deliver the United States cruiser *Boston* to petitioner, in which it was asserted that after survey and condemnation the cruiser had been condemned; that thereafter, and in accordance with the acts of Congress, the Secretary of the Navy had advertised the cruiser for sale and that plaintiff was the highest bidder, and that he was therefore entitled to the boat. The court held that as the cruiser in question was the property of the United States the suit could not be maintained, and said:

The United States is the owner in possession of the vessel. It can not be interfered with behind its back, and as it can not be made a party this suit must fail (*Belknap v. Schild*,

161 U. S. 10; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 606; *Oregon v. Hitchcock*, 202 U. S. 60, 69; *Naganab v. Hitchcock*, 202 U. S. 473, 476).

Belknap v. Schild, 161 U. S. 10, 11.

In this case the plaintiff, as owner of a patent for a caisson gate, brought suit against the defendants, alleging that they had infringed his patent rights and asking for an injunction and damages. The defendants were officials of the United States and averred that the only caisson gate that was under their supervision and control was located in a navy yard belonging to the United States, and that the gate had been built by other parties under a contract with the United States.

It was held that the grant of letters patent entitled the grantor to the exclusive right to the patent as against the world; that as the United States has consented, by various statutes, to the institution of suits against it upon their contracts, it might, therefore, be sued by a patentee for the use of his invention under a contract made with him by the United States or its authorized officers; that the exemption of the United States does not protect their officers from being personally liable to an action of tort by a private person whose rights of property have been invaded, but that the United States is not liable for, nor consented to be sued for, wrongs done by its officials in the discharge of their duties.

It was accordingly held that in so far as the defendants had themselves infringed plaintiff's patent

rights the suit was not against the United States, but was against the defendants personally. However, it was held that with respect to the injunction sought to restrain the use of the gate in question, the suit was against the United States because the United States owned the property.

The court in this connection said (l. c. 24):

In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. *The United States could not hold or use it, except through officers and agents.* Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; *the United States were the only real party against whom alone in fact the relief was asked and against whom the decree would effectively operate;* the plaintiff sought to control the

defendants in their official capacity and in the exercise of their official functions as representatives of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare, and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited.

In *Louisiana v. McAdoo*, 234 U. S. 627, it was held that a suit against the Secretary of the Treasury to review his action in determining the rate of duty to be collected, under statutes and treaties, on an imported article, which action involved judgment and discretion, and to mandamus him to collect a specific amount, is in effect a suit against the United States, and that as the case did not come within any of the exceptions to the established rule that the United States can not be sued without its consent, it was properly dismissed.

RESPONDENT'S AUTHORITIES.

Most of the authorities cited by respondent are cases of injunction or mandamus against Cabinet officers or others to require them to perform a purely ministerial act requiring no judgment or discretion, or cases to restrain them from abusing or overstepping their lawful powers. We have no quarrel with these

cases. If a Cabinet officer, under a mistaken view of his legal authority in connection with one of the duties of his office, does what the law prohibits, he, like anyone else, is to be restrained, and a suit for this purpose is not one against the United States. Such a suit was *Philadelphia v. Stimson*, 223 U. S. 605. This is not such a suit. By this suit the plaintiff seeks to restrain the Secretary of War from taking action authorized by a contract of the United States upon the ground that this action was an abuse of his judgment and discretion. This, under the authorities heretofore cited, the courts will not do.

We respectfully submit that the court should issue its permanent writ of prohibition as prayed for in the petition.

HARRY M. DAUGHERTY,
Attorney General.

JAMES M. BECK,
Solicitor General.

LON O. HOCKER,
Special Assistant to the Attorney General.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETI-
TION OF THE UNITED STATES
OF AMERICA, AS OWNER OF
NINETEEN BARGES AND FOUR
TOWBOATS.

No. 23

**RETURN OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF MISSOURI AND THE
HONORABLE CHARLES B. FARIS,
JUDGE THEREOF**

Now comes the District Court of the United States for the Eastern District of Missouri and comes Honorable Charles B. Faris, Judge of said Court, and, for their return to the order to show cause why a writ of mandamus and/or a writ of prohibition should not be granted, show unto the Honorable Court here, that in the matter concerning which they have been cited to appear, they proceeded with, and were proceeding in the proper exercise of their jurisdiction in such matters conferred upon them by law, and that there is no

valid reason why the rule, heretofore made upon them, should be made absolute.

The respondents admit that one Edward F. Goltra commenced a civil suit in the respondent court as alleged in the petition for a Writ of Prohibition and that Exhibit No. 1, set forth on page 13 of said petition, is a true copy of the bill of complaint filed by said Goltra. The respondents admit that the allegations in said petition concerning the contents of said bill of complaint are generally correct, with the exception of the statement that, "the right was reserved to the lessor in said contract to terminate said lease and retake possession of said boats and barges if in the judgment of the lessor, the said Edward F. Goltra had not complied with the terms and conditions on his part to be performed thereunder," which statement the respondents say was not in the bill of complaint as an examination of Exhibit No. 1 discloses.

The respondents further admit the issuance of the mandatory and restraining order and order to show cause, March 25th, 1923, as alleged as set forth; the filing of the suggestions of the Attorney General of the United States, Exhibit 2, as set forth; the filing of the returns of Col. T. Q. Ashburn and John W. Weeks, Secretary of War of the United States, Exhibits 3 and 4, as set forth; the filing of the defendant's motion to dismiss the proceedings, Exhibit 5, as set forth, and the overruling of said motion April 30th, 1923.

The respondents further state that they have no knowledge whether or not Maj. Gen. Lansing H. Beach, Chief of Engineers of the United States Army on April 27th, 1923, or at any other time terminated or can-

celled said contract for, or on behalf of, the United States and show to this Honorable Court that such letter of cancellation, if true, never appeared before the respondents, and neither it nor the Petitioner's Exhibit No. 6, is any part of the record in this case and has never been filed. Further the respondents say that said Exhibit No. 6 does not purport to be certified as a true copy of any document and the petitioner does not state in its petition that it is a part of the record in the proceedings before the respondents; that said Exhibit No. 6 was inserted between exhibits certified to by the Clerk of these respondents and Exhibit No. 6 is expressly excepted from said certification.

These respondents further say that the civil suit commenced by said Goltra against said Col. T. Q. Ashburn, John W. Weeks and James E. Carroll is not a suit against the United States, but one in which, by bill of complaint, the complainant alleges the right of possession of the towboats and barges in the complainant Goltra, and that the individual defendants, Col. T. Q. Ashburn, John W. Weeks and James E. Carroll, were unlawfully combining and conspiring to deprive the complainant of his property without due process of law; that in pursuance of their unlawful purpose they had, with force and violence, and against the protest of the complainant, taken possession of a portion of said towboats and barges and caused them to be towed or hauled away, that while complainant's bill was in the course of preparation, the defendants were proceeding, with a large force of men, to take away from complainant and remove from St. Louis all of the remaining towboats and barges, all of which more fully appears by said bill of complaint, Exhibit No. 1.

That these respondents have held and decided that said suit of said Edward F. Goltra was not a suit against the United States, but one against individual defendants who were alleged to be depriving said Edward F. Goltra of his property in violation of law.

That these respondents aver that there is an adequate remedy by appeal.

These respondents say that they are, now and at all times, ready and willing to obey whatever orders this Honorable Court may see proper to make in the premises; and aver that they issued the orders, in said suit of Edward F. Goltra, as they believe they had the right to do, relying upon the authority of the decisions of this Honorable Court and other courts; and having fully made return respectfully pray to be discharged.

United States District
Court for E. Dist. of Mo.
By C. B. Jarvis Judge
C. B. Jarvis

Respondents.

Joseph L. Acasio
Hugland W. Robert
Chas. C. Caplan Allen
Attorneys for Respondents.

Argument for the United States.

EX PARTE IN THE MATTER OF THE UNITED STATES, AS OWNER OF NINETEEN BARGES AND FOUR TOWBOATS, PETITIONER.

PETITION FOR A WRIT OF PROHIBITION.

No. 23, Original. Argued on return to rule to show cause November 19, 20, 1923.—Decided December 10, 1923.

A suit in the District Court against federal officials involving the plaintiff's rights to personal property under leases from the United States and to an injunction preventing the defendants from taking it from his possession, should not be restrained by a writ of prohibition from this Court, upon the ground that the suit in effect is against the United States, where the questions of property and possession presented are doubtful, and where, if they be erroneously decided, the remedy by appeal from the District Court will be adequate. P. 392.

Rule discharged; petition denied.

APPLICATION by the United States for the writ of prohibition to restrain the District Court from entertaining further jurisdiction over a suit against federal officers, which was alleged to be in effect a suit against the United States and its property.

Mr. Lon O. Hocker, Special Assistant to the Attorney General, with whom Mr. Attorney General Daugherty and Mr. Solicitor General Beck were on the brief, for the United States.

Right to prohibition: *Naganab v. Hitchcock*, 202 U. S. 473; *Smith v. Whitney*, 116 U. S. 167; *In re Rice*, 155 U. S. 396; *Ex parte Simons*, 247 U. S. 231; *Ex parte State of New York*, 256 U. S. 490; *Ex parte Chicago, R. I. & P. Ry. Co.*, 255 U. S. 273; *Ex parte Peterson*, 253 U. S. 300.

The suit in question is against the United States. *Louisiana v. McAdoo*, 234 U. S. 627; *Wells v. Roper*, 246 U. S. 335; *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*,

123 U. S. 443; *The Siren*, 7 Wall. 152; *Oregon v. Hitchcock*, 202 U. S. 60; *Nagannab v. Hitchcock*, 202 U. S. 473; *Stanley v. Schwalby*, 162 U. S. 255; *Carr v. United States*, 98 U. S. 433; *Louisiana v. Garfield*, 211 U. S. 70; *New Mexico v. Lane*, 243 U. S. 52; *Goldberg v. Daniels*, 231 U. S. 218; *Belknap v. Schild*, 161 U. S. 10. *Philadelphia Co. v. Stimson*, 223 U. S. 605, distinguished.

Mr. Joseph T. Davis and Mr. Douglas W. Robert, with whom Mr. Charles Claflin Allen was on the brief, for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Motion on part of the United States, as asserted owner of nineteen barges and four towboats, praying a writ of prohibition to be directed to the Hon. C. B. Faris, a Judge of the District Court, Eastern Division of the Eastern Judicial District of Missouri, and the other Judges thereof, to prohibit him and them from asserting and exercising jurisdiction in a certain suit brought March 25, 1923, by Edward F. Goltra against John W. Weeks, Secretary of War, and other officers of the United States, in which it was averred that a contract was made between the United States, represented by Major General William M. Black, Chief of Engineers of the United States Army, as lessor, and Goltra, as lessee, whereby the boats and barges, then under construction by the United States, were leased and chartered to Goltra for the period of five years from the date of delivery of the boats and barges to him, Goltra, upon the payment of certain periodical rentals and a compliance by Goltra of other terms and conditions.

The suit by Goltra, the pleadings in which are detailed in the petition, was brought to determine his rights under the contract and a supplement to it.

The contract was preceded by negotiations between Goltra and representatives of the Government, particu-

larly with the War Department and the then Secretary of War, which included among other things the construction of a fleet of towboats and barges in the then emergency of war. But after the signing of the Armistice, when the emergency of war had ceased, other negotiations were had between Goltra and the War Department and the Secretary of War, and a lease was made, the contract above, whereby the boats and barges were leased to Goltra, by him to be operated on the Mississippi River and its tributaries as a common carrier, he to pay all operating expenses, to take out fire and marine insurance, and incur and discharge other obligations.

On May 26, 1921, the supplement to the contract was entered into between Major General Beach, then Chief of Engineers of the United States Army, the successor of Black.

On March 3, 1923, Weeks as Secretary of War undertook to cancel the contract for the non-compliance by Goltra, as lessee, with its terms and conditions, and demanded the return of the boats and barges to the United States, and the defendants on March 25, 1923, unlawfully took possession of some, and were about to take possession of the remainder of them.

There was a prayer by Goltra for a temporary restraining order against such action, or against any action interfering with his possession. There was also a prayer for a temporary injunction against any act whatsoever looking to the cancellation and termination of the lease, or the retention of the boats and barges taken before the attempted cancellation of the contract. The prayer was, that, upon final hearing, a decree be entered in favor of Goltra to determine his rights under the contract and to perpetually enjoin the defendants from interfering in any way with his rights thereunder.

A mandatory order was issued as prayed, and an order to show cause why a temporary injunction should not be issued.

In response to the order to show cause the Attorney General filed suggestions against the jurisdiction of the court, and subsequently the other defendants made returns to the order averring that the suit was, in purpose and effect, one against the United States and its property.

A motion was made in accordance with the representations. It was overruled, and the defendants granted time to plead.

It is alleged in the petition that unless restrained the District Court Judge will proceed with the cause and issue an injunction as prayed by Goltra, and that such order will deprive the United States of the possession and use of boats and barges of the value approximately, of \$3,800,000.

Prohibition was prayed as above stated.

The return of Judge Faris to the petition concedes some of its allegations and denies others. It denies the character ascribed to Goltra's suit. It alleges that there is a right of possession of the boats and barges in Goltra, and that while his bill was in course of preparation the defendants in the suit were proceeding with a large force of men to take from him and remove from St. Louis the boats and barges that remained in his possession. And that the suit was not one against the United States but against individual defendants who were proceeding in violation of law. And it is averred that there is an adequate remedy by appeal.

The answer of Goltra to the petition is presented with elaborate detail of fact and argument. In foundation and essence it is the same as that of the District Court. The opinion of the court, which was oral, is attached to it. The opinion cites that of Judge Baker in *United States Harness Co. v. Graham*, in the District Court for the Northern District of West Virginia, 288 Fed. 929.

The merits of the case present interesting questions. The question of the remedy is, however, the more insistent. Does the case justify it? Prohibition is a remedy

of exigency and in exclusion of other process of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. *Ex parte Muir*, 254 U. S. 522, 534. And doubt in the instant case would seem to be justified, for two District Courts have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal.

Ex parte Oklahoma, 220 U. S. 191, and cases cited, is a complete exposition of the writ and its uses. The opinion in that case observed the distinctions of prior cases, that is, that the writ is a remedy against unwarranted assumptions of jurisdiction and that, besides, the condition of its issue is that the party attacking the jurisdiction has no other remedy. In other words, the writ cannot be made to perform the office of an appeal or writ of error. Are the decisions applicable here?

There was submitted to the court the contracts and their construction and effect—whether under them the United States or its officers retained property in the boats and barges or whether that property was transferred with the right of possession to Goltra. The court so construed them, adjudging Goltra's right to the property and, necessarily, his right to the possession of it, and that he was entitled to an injunction to protect that possession pending the suit. From that decision there was right of review by appeal, and it would be timely and adequate for relief if the decision were erroneous. Judicial Code, § 129; *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 214; *Denver v. New York Trust Co.*, 229 U. S. 123, 136; *Ex parte Chicago, Rock Island & Pacific Ry. Co.*, 255 U. S. 273.

Writ denied.

The power of the Postmaster General was checked by an injunction in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. In that case, Mr. Justice Peckham applied the rule of law as follows, p. 110:

“The Postmaster General’s order, being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto, until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, **yet such decision, being a legal error, does not bind the courts.**”

Wadsworth v. Boysen, 148 Fed. 771 (Nov. 23, 1906), C. C. A., 8th Circuit, was a suit to enjoin an Indian Agent from obstructing plaintiff from prospecting for the purpose of selecting mineral lands thereon. Demurrer to bill overruled. Temporary injunction granted—on appeal—affirmed.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

The opinion by Philips, District Judge, after citing

authorities, affecting the title to land, notably *Minnesota v. Hitchcock*, 185 U. S. 377, draws the distinction between cases, and cites most of the leading cases, *contra*, as follows:

“The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in *Noble v. Union River Logging Railroad*, 147 U. S. 172:

“ ‘If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a *mandamus* if he refused to do an act which the law plainly required him to do.’ ”

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, before Sanborn and Smith, Circuit Judges, and Trieber, District Judge, was an appeal from the District Court for the District of South Dakota. The suit was by the Belle Fourche Valley Water Users' Association against Frank C. Magruder and others. From an order refusing to set aside a restraining order and granting an interlocutory injunction, defendants appeal. Opinion by Sanborn, Circuit Judge, p. 74 *et seq.*

“(3) Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against

their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts.

* * * * *

If the averments of the complainant are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. **They are, therefore, not the acts of the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts."**

In closing his opinion Judge Sanborn says, p. 82:

"(6) The controlling reason for the existence of the right to issue an interlocutory injunction is that the Court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before these claims can be investigated and adjudicated.

"A preliminary injunction maintaining the existing situation may properly issue whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be certain, great, and irreparable if the motion is denied, while the loss and inconvenience to the opposing party will be inconsiderable."

The very latest case in point of time, and one almost identical with the case at bar, is *United States Harness Co. v. Graham, et al.*, in the District Court of the U. S. for the N. Dist. of West Va. (*Supra.*)

THE UNITED STATES A TRADER; NOT A GOVERNMENT.

In the case of *South Carolina v. United States*, 199 U. S. 43, Mr. Justice Brewer makes some pertinent contrasts—applicable to the case at bar—between the exercise of governmental functions and functions of a private nature in which the State, the Government, engages as a business.

To like effect is the language of Chief Justice Marshall in *Bank of U. S. v. Planter's Bank of Georgia*, 9 Wheat. 904, where he said:

“ ‘It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that Company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.’ ”

These words are quoted and followed in many cases; *e. g.*

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Ky., 11 Peters 256, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
Panama R. R. v. Curran, 256 Fed. 772.

(C. C. A.)

Lord & Burnham v. U. S. S. B. E. F. C. (D. C.)
256 Fed. 957.

And see

The *Pesaro*, 277 Fed. 473 (D. C.) (December 13, 1921.)

To these adjudicated cases, add the language, in the same spirit, in the statute from which alone the Defendant John W. Weeks, as Secretary of War, derives his authority in this case; that is to say: The operation of the transportation facilities under the Secretary of War is to be "in the same manner and to the same extent as if such transportation facilities were privately owned and operated."

Sec. 201 (e) of the Transportation Act of 1920 is as follows:

"(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the 'Shipping Act, 1916,' as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein."

DEFENDANTS' AUTHORITIES.

The authorities cited by the defendants in their brief do not reach the gravamen of this case. Most of them

are cases in which the only question was the divesting of title to land or other property out of the United States; the title to which was in the United States.

Whether the contracts which are copied in full in the bill in this case, are or are not to be considered for all purposes as contracts with the United States, the fact remains that the subject matter of said contracts related to the carrying on of a private business venture for a profit, in which the United States was a "partner," within the meaning of Chief Justice Marshall in the case of

Bank of U. S. v. Planters Bank of Ga., 9 Wheat
904.

and the numerous cases which followed it, and are cited elsewhere in this brief.

And the United States was acting as a "Trader," and not in a "Governmental" capacity.

South Carolina v. U. S., 199 U. S. 43 (1905).

If the defendants combined together, and threatened to take away by force from the plaintiff the only property with which that partnership could be carried forward, etc., injunction is the only remedy.

We print in the Addenda the opinion rendered by the respondent, Honorable Charles B. Faris, Judge of the District Court, on the motion of the Government and of the defendants, to dismiss the cause on the ground that it was a suit against the Government. This opinion was rendered after the motion had been fully argued and briefed. We are submitting it not only because it fully answers the argument of the Petitioner, but also because it shows the Court's theory on which the point was decided.

CONCLUSION.

The attitude of the Government is rather inconsistent. Its law, under the Constitution, is the supreme law of the land and it expects and exacts the most scrupulous respect for it under severe penalties. Now here we have an army officer, Col. T. Q. Ashburn, directly violating his orders, committing a trespass and depriving a citizen, who has contracted in good faith with Government officials, of his property and rights, this in direct violation of the Constitution.

Col. Ashburn's orders were, in the event Mr. Goltra declined to surrender the towboats and barges, to "apply to the United States District Attorney at St. Louis REQUESTING THE INSTITUTION OF LEGAL PROCEEDINGS FOR THE RECOVERY OF SAID PROPERTY." Up to this point some regard seems to have been had for law by the Government officials, but that disappeared when the army officer, accompanied by a large force of men, took violent and forcible possession of the property, depriving the complainant of his day in court and of his property without due process of law.

If the officials of the United States Government demand respect for the law and require obedience, how can they expect such when they themselves have no respect for it? It is a dangerous thing for this Government to decide matters of private right with an army colonel and a force of men.

And now that the complainant has thwarted the il-

legal act, confessedly one in which the defendants had a guilty knowledge, else they would not have selected Sunday for it, a day when it might be thought impossible for the court to act, the Government itself comes into this Honorable Court and seeks its aid in preventing a hearing of the complainant's cause of action before one of its own courts. Thus it asks this Honorable Court its writ of prohibition to make sure that the original wrongful act of Col. Ashburn and the other defendants shall be successful and that the army of the United States, and not the courts, shall decide the rights of property of citizens in time of peace, a thing we feel sure this Honorable Court will refuse to do.

One thought more. Should the Government officials be successful in this proceeding what faith can its citizens have in its contracts in the future? Will any citizen rely upon written promises of the United States Government if they can be violated by its army without a moment's notice?

If there ever was a case which required a court of equity to act to prevent such usurpation of authority of which these defendants have been guilty, this is one. The acts of Secretary Weeks and Col. Ashburn together with the connivance of the United States District Attorney, was a tyrannical use of the military power of this Government. This same branch attempted the same methods in the United States Harness case and was thwarted there. If such acts, of which these men have been guilty, are permitted to go unchallenged, this country will be in no position to complain of the militaristic government of our late enemy, the German Empire.

We most respectfully ask that the preliminary writ be quashed and the petition for a writ of prohibition be denied.

Respectfully submitted,

Geo. J. Davis
Amos W. Roberts
Chas. C. English Allen
Attorneys for Respondents.

ADDENDA.

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

EDWARD F. GOLTRA,

Plaintiff,

VS.

WEEKS, ET AL.,

Defendants.

No. 6639
In Equity.

FARIS, J.

ORAL OPINION OF THE COURT ON MOTION TO DISMISS BILL.

Plaintiff entered into a charter-party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four towboats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter-party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have

been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the defendants in the manner hereinafter more specifically set out.

The parties to this lease or charter-party are recited in the instrument thus:

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part.”

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employees of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be

taken from him without due process of law, and without any process of law whatever, and in contravention of the charter-party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn and Carroll, as District Attorney of the United States (the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for non-compliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such non-compliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that

not only does the language of the charter-party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter-party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter-party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter-party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in

Court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter-party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emergency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a *quasi* private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 566).

By the act of Congress of June 5, 1920 (41 Stat. 988) the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships

and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes and existing contracts about them had placed such custody and control.

For the Act of June 5, 1920, excepted these vessels from the transfer to the Shipping Board by a proviso to Section 4 of said Act, which proviso reads:

“Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this Act.”

Since the vessels in dispute were not only “vessels assigned to inland waterways,” but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War De-

partment, to plaintiff here; for, on the second of the above propositions the bill before me says:

“These vessels were not completed until long after said date (that is to say, May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922.”

Whether this allegation is true or not, does not, of course, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and control in the War Department arose solely by reason of the fact that the \$3,860,000.00 with which they were constructed, had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was subordinate to, and acted under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act, of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter Act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the pro-

visions of Paragraph 4, Section 6, of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by Section 6, *supra*, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said Section 201, which reads thus:

"Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis."

A further provision of said Section 201 of the Transportation Act, contained in clause (e) thereof provided, that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities, affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly

limits the laws, regulations and liabilities to admiralty laws and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525) whereby, *inter alia*, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or *in rem*.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control, of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific application of clause (d) of Section 201, *supra*, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt, that the United States is the beneficial owner of them. It owns them because it owned, and now owns, all of the capital stock of the

Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation, which the latter ever used or ever had. But, in a sense, the United States was a *cestui que trust* of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a *quasi* private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to pre-war normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

(a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation.

(b) That the said Fleet Corporation was a *quasi* private corporation, in which all of the capital stock was owned by the United States;

(c) That all of the money with which the Fleet Corporation operated, came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the reve-

nues of the United States, by the Act of March 1, 1918 (40 Stat. 438) or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels, was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shall have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent. (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549).

This case here at bar, it is true, is not an action

against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of *Wells v. Roper*, 246 U. S. 355; *Oregon v. Hitchcock*, 202 U. S., 60; *Nogamat v. Hitchcock*, 202 U. S., 473; *Stanley v. Schwalby*, 162 U. S., 255; *Louisiana v. Garfield*, 211 U. S., 70; *Louisiana v. McAdoo*, 234 U. S., 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (*vide*, *The Siren*, 7 Wall. 152) captured by it in War, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and post-roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of *Kaufman v. Lee*, 106 U. S., 196, wherein suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way

as a military reservation, and *Stanley v. Schwalby*, 162 U. S., 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true, the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps subsists. The difference between the two cases, as they are distinguished by the Supreme Court in the *Stanley* case, is that in the *Lee* case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the *Stanley* case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no Court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after all is said, is the only subject of a lawsuit.

But the *Lee* case, *supra*, (*Kaufman*, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to

the jurisdiction of the trial Court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion, that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Shipyards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law, and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant, Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secretary of War, would have constituted that due process of law, which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case, particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case, in this pertinent and apposite language:

“No man,” said Mr. Justice Miller, “in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound

to submit to the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this Court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of a Government without lawful authority, without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty, and the protection of personal rights.”

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly no Government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by

those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter-party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately, at least, countenanced only lawful re-possession, the presumption ought to be entertained, that the acts of defendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive, that a similar view, in a very similar case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this government, these alone ought to suffice.

Without more, I am of the opinion, that the motion to dismiss on the grounds now urged by defendants, ought to be overruled, and so it will be ordered.

April 30, 1923.

St. Louis, Missouri.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA.

UNITED STATES HARNESS
COMPANY, A CORPORATION,

Against

W. A. GRAHAM, F. F.
SCHOWDEN AND JAMES
R. SHEPHERD, JR.

} In Equity

BAKER, J.

This is a suit instituted in the Circuit Court of Jefferson County, by United States Harness Company v. W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., alleging that on September 24, 1920, plaintiff entered into a contract with the Government of the United States of America, acting by and through E. C. Morse, Director of Sales, Supply Division, General Staff, he being then and there contracting officer on behalf of the Government, acting by and under the authority of the Secretary of War, for the sale of certain harness, saddles, leather, spare parts for harness and saddles, hardware and accessories, cut leather stock, etc., fully set out and enumerated in contract filed as "Exhibit A" with plaintiff's bill. And on December 9, 1920, two supplementary contracts were entered into by and between said parties, copies of which

said supplementary contracts are filed as "Exhibits B and C" with plaintiff's bill, whereby certain other harness and other equipment was sold to the plaintiffs by the United States of America by and through said E. C. Morse, Director of Sales.

Pursuant to said contracts plaintiff proceeded to conduct the business covered thereby, receiving from time to time goods and property from the Government at its factories at Ransom, in Jefferson County, and proceeded to remanufacture and make suitable for commercial and industrial purposes such parts thereof as required such remanufacture, and to sell the same to various parties at various places throughout the United States.

Complainant alleges that in conducting said business it has accounted for regularly to the Government, and paid over to it, all money to which the Government has been entitled under the terms of said contract, and has, in all respects and at all times, fully and completely performed its part of said contract.

Complainant further alleges that on June 14, 1921, the President of the United States signed an order declaring void the same contract, without giving it an opportunity to be heard and without assigning any sufficient reason for said action, which said order is in words and figures following:

THE WHITE HOUSE.

"By virtue of the power vested in me, I hereby declare void, the contract of September 24, 1920, and the two contracts of December 9, 1920, between the Director of Sales of the War Department and the United States Harness Company.

(Signed) Warren G. Harding."

That pursuant to said executive order, Hon. John W. Weeks, Secretary of War of the United States of America, issued the following order:

“Lt. Col. Wm. A. Graham, July 14, 1921.
Judge Advocate General's Office,
Washington, D. C.

You will proceed to Ransom, W. Va., at which place is located the plant of the United States Harness Company. Upon arrival at that place you, in company with a representative of the Department of Justice and an officer of the Quartermaster Corps, will, **in the name and by the authority of the President of the United States, demand from the United States Harness Company, immediate possession of certain property of the United States** now located upon the premises of said company, being property involved in the three certain alleged contracts between the Director of Sales of the War Department and the said Harness Company, one being dated September 24, 1920, and two dated December 9, 1920, which said alleged contracts were, on the 14th day of June, 1921, declared void by the President of the United States.

“Upon such demand the officer of the Quartermaster Corps will immediately, unless oposed by force of legal process, take physical possession of said property for and in the name of the United States, and at once remove the same from the premises of the United States Harness Company by causing the same to be loaded into trucks or other vehicles of the United States, to be furnished for that purpose.

“By direction of the President.

(Signed) John W. Weeks,
Secretary of War.”

That on the 15th day of July, 1921, the said W. A. Graham, Lt. Col. of the Judge Advocate General's Office of the United States Army, F. F. Schowden, being a major in the Quartermaster Corps of the United States Army, and James R. Shepherd, Jr., being an employee and representative of the Department of Justice of the United States Government, accompanied by numerous soldiers, arrived at complainant's factory at Ransom and entered, unlawfully, upon the property of complainant, and announced that they would proceed to enter upon complainant's property and all parts thereof against its protest. And proceeded to take possession of and move away property and goods of great value, which complainant alleged it had lawfully in its possession under said contract with the United States Government, and which was delivered to it by the United States Government in pursuance to said contracts. And which complainant had stored on its premises awaiting remanufacture or sale in its present condition, in pursuance to said contracts.

That said representatives of the United States Government, and soldiers under their orders, unlawfully entered upon complainant's premises and threatened to, and actually did, take possession of said property and goods and interfered with complainant's business in all other respects, bringing unfair disrepute upon its good name and destroying the good will of its customers, all which was irreparable loss and injury to complainant.

That complainant protested against the action of said defendants and ordered them off its premises, but said defendants, by virtue of the force of armed men, disregarded complainant's protests and order.

Complainant further alleges that it is advised and believes that the order of the President of the United States aforesaid, dated June 14, 1921, was made without constitutional authority on the part of the President and is illegal and void; that the United States Government is bound by said contracts and cannot avoid or evade the same without depriving complainant of its vested rights under the Constitution and Laws of the United States.

Complainant prays that an injunction be issued at once against the said defendants restraining and prohibiting them, either themselves or any soldiers or agents acting under their orders, from entering upon its premises and from remaining thereon, and restraining and preventing them from interfering with taking possession of any property upon complainant's premises or in its lawful possession. And further restraining and prohibiting them from retaining or removing beyond the limits of Jefferson County any such property which they already had removed from complainant's premises, and for such further and general relief as to equity shall seem meet.

On July 15, 1921, J. M. Woods, Esq., Judge of the Circuit Court of Jefferson County, West Virginia, granted the injunction as prayed for in said bill and enjoined and prohibited, until further order of the Court, W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., either themselves or by soldiers or agents or employees acting for or under them, from entering upon the premises of said United States Harness Company in said Jefferson County and from interfering with or taking possession of any property on said premises or elsewhere in the possession of the

United States Harness Company, and from remaining upon said premises and from retaining possession or removing outside the limits of Jefferson County any property already taken from said United States Harness Company before the service of said order.

Said injunction order further provided that before it should be effective, plaintiff should give bond before the Clerk of the Circuit Court of Jefferson County in the sum of \$2,500.00, conditioned according to law, with security to be approved by the Clerk. Bond was immediately given as provided by said order, and said injunction order was served upon F. F. Schowden and James R. Shepherd, Jr., by delivering to each of them in person, in Jefferson County, a true copy thereof on July 15, 1921, at four (4) o'clock P. M., the said W. A. Graham not being found in said county.

On July 21, 1921, the United States of America through Stuart W. Walker, District Attorney for the Northern District of West Virginia, served notice on the complainant United States Harness Company that on the 23rd day of July he would move the Judge of the Circuit Court of Jefferson County, in vacation, for an order removing said cause to the District Court of the United States for the Northern District of West Virginia.

On July 23, 1921, petition for removal was regularly filed and motion made for removal of said cause to the United States District Court for the Northern District of West Virginia, copy of President's order being filed with said petition for removal marked "Exhibit A" and copy of order of Honorable John W. Weeks, Secretary of War, directed to Lt. Col. W. A. Graham,

dated July 14, 1921, was duly filed with said petition marked "Exhibit No. 2."

Upon consideration of said petition and motion, the Circuit Court of Jefferson County entered an order removing said cause to the District Court of the United States for the Northern District of West Virginia.

On July 27, 1921, Stuart W. Walker, Esq., United States Attorney for the Northern District of West Virginia, and as such attorney for the defendants, served notice upon complainant that on the 2d day of August, 1921, at ten o'clock, A. M. or soon thereafter, he would move the Judge of the United States District Court for the Northern District of West Virginia, at the Government Court Room in Martinsburg, West Virginia, to dissolve the injunction previously entered in the cause of the United States Harness Company v. W. A. Graham and others, and to dismiss said cause, for the reason that said suit is in effect one against the United States and involves the property rights of the United States, and for other reasons apparent upon the face of the bill and exhibits therewith filed.

On August 2, 1921, at the Government building in Martinsburg, pursuant to said notice motion was made by W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., defendants, by Stuart W. Walker, United States Attorney, and as such attorney for defendants, to dismiss this cause for the reason that the averments of the bill do not constitute such facts as show a valid cause in equity and for the following reasons:

1. It plainly appears from the bill and exhibits filed therewith that this suit is one involving substantial

property rights and interests of the United States Government, and therefore while nominally a suit against the individual defendants, is in fact one against the United States.

2. That the same is prosecuted without the consent of the United States.

3. There is no allegation of fact in the bill sufficient to constitute a cause of action against the United States.

4. The bill is one for an injunction only and no other relief is specifically prayed for in the bill.

5. The suit is a subterfuge as one against the defendants individually in an effort to give jurisdiction to this Court, which would not have jurisdiction of the suit if it were instituted directly against the Government.

6. This Court is wholly without jurisdiction to entertain the suit.

Said motion was exhaustively argued by counsel for both plaintiff and defendants, and briefs filed.

CONSIDERATION OF CASE.

Upon considering the matters thus far involved in this suit, I am confronted with Article 5 of the Constitution of the United States, wherein it states:

“No person shall * * * be deprived of life, liberty or property, without due process of law * * *”

In construing the meaning and extent of protection under this provision of the Constitution against action without due process of law, it has always been recognized that one who has acquired rights by administrative or judicial proceedings cannot be deprived of them without notice and opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law.

It is unnecessary to recite the decisions in which this principle has been repeatedly recognized.

It is enough to say that its binding obligation has never been questioned by the highest court in our land.

Note the President's order: "By virtue of the power vested in me, I hereby declare void the contract of September 24, 1920, between the Director of Sales of the War Department and the United States Harness Company. (Signed) Warren G. Harding."

Also note the language of the order executed by John W. Weeks, Secretary of War, directed to Lt. Col. Wm. A. Graham, Judge Advocate:

"You will proceed to Ransom, W. Va., at which place is located the plant of the United States Harness Company. Upon arrival at that place, you, in company with a representative of the Department of Justice and an officer of the Quartermaster Corps, will, in the name and by the authority of the President of the United States, demand from the United States Harness Company immediate possession of certain property of the

United States now located upon the premises of said company, being property involved in the three certain alleged contracts between the Director of Sales of the War Department and the said Harness Company, one being dated September 24, 1920, and two dated December 9, 1920 which said alleged contracts were, on the 14th day of June, 1921, declared void by the President of the United States.

Upon such demand the officer of the Quartermaster Corps will immediately, unless opposed by force of legal process, take physical possession of said property for and in the name of the United States, and at once remove the same from the premises of the United States Harness Company by causing the same to be loaded into trucks or other vehicles of the United States, to be furnished for that purpose.

By direction of the President.

(Signed) John W. Weeks, Secy. of War."

There is no man in all this land, in my opinion, who would more graciously accord to a citizen the right to question, in good faith, the authority of any of his acts, more quickly than President Warren G. Harding. There is no man who would be slower than the President to deny the right of the citizen to seek the protection of Courts against an unlawful invasion of property, even though that invasion was founded upon his own edict. Neither would he criticize any citizen for respectfully, but nevertheless firmly, refusing to bow to the mandate of an unconstitutional or illegal order even though it bore his signature.

“By virtue of the power vested in me, I hereby declare void the contract of September 24, 1920, and the two contracts of December 9, 1920, between the Director of Sales of the War Department and the United States Harness Company.” Is that order a usurpation of that power which is reposed under our Government only in the judicial branch, and never constitutional in the executive branch?

Is the citizen to be denied his right of intervention and protection from the judiciary solely because the President has signed a paper that would strike down the claimed vested legal property rights of a citizen?

Can contracts alleged to have been legally entered into between citizens and duly authorized representatives of the Government be declared void by the President without resort to the judiciary and an opportunity being given those claiming vested rights thereunder to be heard?

I do not think so.

The motion to dissolve the injunction and dismiss this suit must be overruled, under the present state of the pleadings.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETITION OF THE }
United States of America, as owner } No. 23,
of nineteen barges and four towboats. } Original.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The suit sought to be prohibited by this proceeding is one brought by Edward F. Goltra in the District Court of the United States for the Eastern District of Missouri against John W. Weeks, Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States attorney for that district.

Prior to May 28, 1919, the date of the contract in controversy, the United States Shipping Board Emergency Fleet Corporation had allotted, out of funds appropriated to it by the Government, to the Chief of Engineers of the United States Army, \$3,860,000

for a fleet of 4 towboats and 19 barges, for the primary purpose of transporting iron and coal to and from St. Louis, Mo., as an emergency of war then existing. Contracts were let with private parties for the construction of the fleet. Upon the signing of the armistice the emergency passed, at which time the barges were nearing completion, and, in order to utilize them, the boats and barges were let by the contract in controversy to the complainant, Goltra. This contract is set out in extenso in the bill of complaint which forms a part of this record.

The contract is stated therein to be "between the *United States of America*, represented by Maj. Gen. William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War," and *Edward F. Goltra*, of the city of St. Louis. The contract thereupon sets out certain previous relations between the parties, the allotment of the \$3,860,000 for the construction of the towboats and barges, the letting of the contracts for the construction of the barges, the construction of the towboats for the utilization of the barges, and the passing of the emergency of war. The contract thereupon recites that the lessor charters and leases to the lessee the said boats and barges for a term of five (5) years after the delivery of the first barge or towboat to the complainant.

The contract provides that the net earnings, after deducting operating expenses and maintenance, shall be deposited with the Treasurer of the United States to the credit of the Secretary of War until such time

as the net earnings shall equal the full amount of the cost of the vessels, plus interest at 4 per cent.

Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if desired by the lessee, a board of arbitrators to be selected by the parties shall appraise the value of the fleet, and the lessee is given the *right* or option of purchasing the fleet, with respect to which purchase it is provided that if the sums deposited with the Treasurer by the lessee shall equal the full amount of the cost of the vessels, plus interest, the same shall be applied as payment in full for the fleet; any earnings above that amount to belong to the lessee. If the funds are not equal to the cost, plus interest, but are greater than the appraised value, the whole funds shall belong to the United States and the fleet shall thereupon become the property of the lessee. If the funds are less than the appraised value, they shall be applied to the purchase price at the appraised value and the deficiency paid by the lessee to the United States, in which event the fleet is to be his property. In the event that the funds are unequal to the appraised value, the deficiency payments are to be made by the lessee over a period of fifteen (15) years in equal installments, with interest, the title to the property remaining in the United States until the payment of the whole purchase price.

One of the arguments and covenants of the contract is "*that the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries*

for the period of the lease and of any renewals thereof, transporting iron, ore, coal and other commodities"; that the lessee shall pay all operating expenses and maintain the fleet in good operating condition and provide insurance for the benefit of the United States. Various other provisions for the protection of the United States are contained in the lease which are not necessary to the consideration of the question here presented.

Section 8 of the contract is as follows:

The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

On May 15, 1922, the complainant took possession of the boats under the contract.

On March 3, 1923, the Secretary of War served notice upon the complainant that, in his judgment, the complainant had not complied with the terms and conditions of the contract, *in that he had failed to operate the towboats and barges as a common carrier*, declaring that the contract and the supplement

thereto were terminated, and demanding the delivery of the possession of the towboats and barges to the United States. A similar notice (in view of the contention of the complainant that the Chief of Engineers, and not the Secretary of War, had the right to terminate the contract) was signed by Lansing F. Beach, Chief of Engineers, on April 27, 1923, and delivered to Mr. Goltra on April 30, 1923.

On March 25, 1923, the defendant Ashburn, pursuant to instructions from the Secretary of War, took possession of the towboats and barges, as he contends, without violence or show of force, but as complainant contends, otherwise. On the same day the bill of complaint was presented to the Hon. C. B. Faris, judge of the Eastern District of Missouri, and the mandatory and restraining order, set forth in the record herein, was issued and served upon Colonel Ashburn and Mr. Carroll. This order restrained the defendants from interfering with the possession of the complainant and commanded the return of the boats already taken.

Afterwards the appearance of the Secretary of War was entered in the cause.

At all stages of the proceeding the defendants, by motion to dismiss and otherwise, asserted that this proceeding was, in essence and effect, although not nominally, a suit against the United States and its property. The pleadings raising these questions are set forth in the record filed herewith. This contention was denied by the District Court and the motion

to dismiss overruled. A stay of proceedings has been allowed in order to permit the presentation of this petition to this court.

I.

RIGHT TO PROHIBITION.

We shall hereinafter undertake to satisfy the court that if the suit in controversy is in essence and effect one against the United States, then the District Court of the United States is without jurisdiction, and prohibition will lie. Thereafter we hope to demonstrate that the suit is in effect a suit against the United States.

It may be said by opposing counsel that in view of the right to appeal or in error, the discretion of the court should be exercised against the writ. Granting the existence of the right of final review, we say that the right is inadequate to the needs of the situation as here presented, which, with accompanying lack of jurisdiction in the court below, clearly justifies the writ.

The situation brought about by the institution of the suit and the mandatory injunction issued in connection therewith, is such that prohibition is the only remedy which can afford practical relief. The nineteen (19) barges and four (4) towboats, which are the subject matter of this controversy, are without doubt the property of the United States. They were built at an expense of approximately \$3,800,000, all moneys of the United States. They are capable of being used in connection with commerce and trans-

portation upon the Mississippi River, and their construction was initiated and completed with that very purpose in view. The contract in question was expressly made in furtherance of that purpose, and the action taken by the officers of the United States, authorized by the contract itself, was taken because of complainant's failure to attempt to carry out this purpose.

While the boats are still in the possession of the officers of the United States they are, under the orders of the District Court, being held in harbor within the jurisdiction of that court, and so are incapable of being used in commerce and transportation. A motion is pending to require the return of the boats to complainant.

The litigation with respect to the right to cancel the contract with Goltra, unless disposed of in this proceeding, will undoubtedly be carried to the court of final resort by whichever party may lose in the courts below. In the meantime any possession of the boats, either by the United States or by the complainant, will be subjected to the vicissitudes of the litigation, and at any stage of the proceeding their possession may be taken from one party and transferred to the other, as the particular court dealing with the situation may view the right of the controversy.

The character of the use to which the boats are susceptible is such that no practical service can be furnished by them unless the party holding possession has the unquestioned and uninterrupted right of

possession. If the possession is for the time being left in the United States, it, in order to advantageously use the boats, must enter into contracts with shippers looking to their future use, the performance of which contracts may be jeopardized by the loss of that possession and consequent liability for damages to be adjudged in the Court of Claims as for breach of contract.

The same is true with respect to the possession by Mr. Goltra. He would be at all times, until the end of this litigation, in the position of one holding property which could not be adequately and serviceably used. In order to use this property as a common carrier he would have to comply with the regulations of the Interstate Commerce Commission and with the Shipping Act, and be prepared to perform the contracts and the service which he is permitted to make and render. Therefore, so long as this litigation is pending and undetermined, the use of this valuable property, in which the public is interested from the standpoint of service and the Government from that of revenue, is entirely destroyed, no matter in whose possession it may temporarily be placed, the property itself being affected also by the depreciation and injury incident to nonuse. For these reasons we say that there is *no adequate remedy* by appeal, or error, or certiorari, as the very prolongation of the litigation tends to the destruction of its subject matter.

The situation apparent here, resulting in the tying up of the boats, the consequent loss to the United

States of revenues from use, and the loss to the public in the deprivation of the service which they might render, is such that the discretion of the court, if the view obtains that the right is discretionary and not absolute, ought to be exercised favorably to the writ.

Recurring to our first proposition, we say that if the suit is in essence and effect one against the United States, then the District Court is without jurisdiction and prohibition will lie.

The remedy of prohibition is expressly given by section 234 (sec. 1211) of the Judicial Code in matters of admiralty jurisdiction.

Section 262 (sec. 1239) of the Judicial Code provides that:

The Supreme Court and the Circuit Courts of Appeals and the District Courts shall have power to issue all writs not specifically provided for by statute, and which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

Under the authority of this section, the jurisdiction of the Supreme Court to issue writs of prohibition in respect to common law and equity proceedings is sustained.

In *Naganab v. Hitchcock*, 202 U. S. 473, the court in holding that the court below had no jurisdiction of a suit which was against the United States, said:

Without considering whether the courts would have power to control the action of the

Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there *is no jurisdiction to entertain this case*. In respect to this question it is on all fours with *State of Oregon v. Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S. 60). * * * Upon the authority of the *Oregon* case we hold that there is *no jurisdiction to maintain the present suit*, and the action of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is *affirmed*.

In *Smith v. Whitney*, 116 U. S. 167, which was not an admiralty proceeding, it was said:

But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right.

In *In re Rice*, 155 U. S. 396 (not an admiralty proceeding), it was said:

Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and

has no other remedy is entitled to a writ of prohibition as a matter of right.

In Matter of Simons, 247 U. S. 231, was an application to this court for mandamus, or, if that be denied, for prohibition, to prohibit the District Court from proceeding with a cause which petitioner claimed had been erroneously transferred from the law side to the equity side of the court. The court held that the District Court had no right or power to transfer the cause from the law to the equity side of the court and that it was immaterial what form of extraordinary remedy was afforded to grant relief, although mandamus was adopted as the remedy in that instance.

The court said:

If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.

In Ex Parte State of New York, 256 U. S. 490, this court, in dealing with a jurisdictional question identical with the one here—that is, lack of jurisdiction because the proceeding was, in effect, a suit essentially, but not formally, against the State, and in which a right of appeal existed—said:

The want of authority in the District Court to entertain these proceedings * * * and the fact that the proceedings are in essence

against the State without its consent is so evident that, instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued, as prayed.

In *In re Railroad Company*, 255 U. S. 273, it was held that prohibition would lie to determine the question of the lower court's jurisdiction to proceed against petitioner in a cause in which petitioner claimed it had not been served with process, although in that particular case the rule was discharged and the petition dismissed because it appeared that the petitioner below had filed certain motions and taken certain other steps in the cause which might have constituted a general appearance, and it was held to be within the province of the District Court to determine whether petitioner had in fact entered its general appearance in the cause despite the fact that it had not been served with process. It was there said:

There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who, at the outset, objected to the jurisdiction, has preserved his rights by appropriate procedure, and has no other remedy.

In *In the Matter of Walter Patterson*, 253 U. S. 300, it was held that this court had jurisdiction by man-

damus or prohibition to determine the power and jurisdiction of the District Court to refer, over petitioner's objection, a cause on the law side of the court to an auditor to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury. The court said:

Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was held in *Ex parte Simons*, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties and the court to the inconvenience that would be raised by a proceeding that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded.

It, therefore, appears that prohibition is the proper remedy for the situation here, whether the writ is viewed as one of right or as dependent upon the discretion of the court, provided the suit is one in essence against the United States.

II.

IS THE SUIT IN QUESTION ONE AGAINST THE UNITED STATES?

No one will deny that a sovereignty such as the United States or the constituent States can not be sued either in its own courts or in the courts of another sovereignty without its consent having been expressly given. So it can not be denied that if the suit, although nominally not against the sovereignty, is so in essence and effect, then such suit can not be maintained. These propositions are supported by abundant authorities, which we will hereafter present. So that the vital consideration is to determine whether or not this suit is one in essence and effect against the United States. That question can best be determined by a consideration of the bill of complaint. Let us proceed to analyze that bill for the purpose of ascertaining just what it is.

In the first place, it will be noted that the three defendants are officials of the United States, impleaded as such. The bill recites, in a preliminary way, the situation antecedent to the making of the contract which is the basis of the suit, and which is set out early in the bill. The contract is between the United States and Edward F. Goltra, and its terms have been sufficiently set forth in our statement.

Paragraph 1 of the contract provides that it is covenanted and agreed between the parties "that the said lessees shall operate as a common carrier the said fleet of three or four towboats and barges upon the

Mississippi River for the period of the lease, or of any renewals thereof, transporting iron, ore, coal, and other commodities."

Paragraph 8 of the contract is as follows:

8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; *and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor*, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

The bill then sets out a supplementary contract which deals with the contemplated erection of unloading facilities at St. Louis, the details of which are not necessary to be specifically referred to, except that it is provided in substance, as in paragraph 8 of the first contract, that the lessor may retake possession of the unloading facilities as is provided in said paragraph 8 of the first contract with reference to the boats.

The bill then proceeds to allege that after the complainant had taken over said towboats and barges he was interfered with by the officers of the United States, particularly the Secretary of War, in performing the duties and obligations imposed upon him by the said contract, the details of which are not

necessary to specifically narrate, except that it is averred that by the

acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contracts from carrying out the terms and conditions of the said contracts as a common carrier, or as a private carrier, or in any other manner provided by said contracts; and it became and was and is impossible for the plaintiff to so carry out the contracts under the terms and conditions thereof, unless and until the *lessor* therein, *being the United States*, causes and permits the plaintiff to carry out the conditions of said contracts in manner and form and for the purposes contemplated by said contracts.

Complainant thereupon avers that said contracts constitute in law a contract of charter and lease together with a contract of privilege and option in the complainant to purchase the boats on the terms and conditions therein stated, and that said contract established in the complainant a fixed and definite property right in said towboats and barges, of which the complainant could only be lawfully deprived "by a proceeding in equity for an accounting and a determination by a decree of court of the *lawful interest of each of the parties thereto in the subject matter of said contracts.*"

The bill thereupon alleges that the defendants did, on March 3, 1923, wrongfully and unlawfully undertake to declare said contracts terminated, and did de-

mand from the complainant the immediate possession of the said boats without warrant of law, and threatened to take the same by force, and had actually begun the taking of the same, pursuant to said demand at the time of filing the bill.

The bill thereupon sets forth the notification of date March 3, 1923, of the Secretary of War to the complainant, and the memorandum of the said Secretary of War to the defendant Ashburn.

Following that the bill sets out the reply of the complainant to said communication.

Thereupon the bill charges as follows:

Plaintiff further avers that the United States, *acting through its lawfully authorized representatives*, has not at any time fulfilled the said two contracts of May 28, 1919, and May 27, 1921, by putting the plaintiff into a position or allowing him to take a position where he could carry out the conditions of said contracts, either as a common carrier or as a private carrier under said contract as defined in section 2 (a) of the original contract of May 28, 1919.

Thereupon, the bill alleges the conspiracy between the defendants to deprive the complainant of his property, without due process of law, and the taking possession of the boats.

The prayer of the bill is for a restraining order, without notice, enjoining the defendants from interfering with the possession by the complainant of the boats and barges, commanding them to return those taken and restraining the *defendant Secretary of War*

"from doing any act whatsoever *looking to the cancellation or other termination of said contract* of May 28, 1919, and said supplemental contract of May 27, 1921, *between the United States and said plaintiff*," and enjoining the defendant Ashburn from doing any act in aid of the purpose of said Secretary of War to terminate said contracts and from further interfering with the possession by complainant.

The prayer finally concludes with the following:

The plaintiff prays that on final hearing of this cause of action a decree may be entered in favor of the plaintiff and against the defendants and each of them, which *shall determine the rights of plaintiff as set forth herein under said contracts*, and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

This bill is in legal effect one to specifically enforce the contract set forth therein and to restrain the exercise by the opposite party, the United States, of its contractual right to terminate the contract for complainant's failure to perform the very service primarily contemplated by the contract of lease, which service is expressly covenanted to be performed by the lessee, for the reason that the conditions justifying the termination of the contract did not exist, inasmuch as the lessee's failure to perform was occasioned by acts of noncooperation or of frustration on the part of the United States. In other words, the bill proceeds upon the theory not that the *right* to declare the contract terminated did not

exist at all, but that a state of fact from which the right might arise did not exist, as had been so determined by the Secretary of War, thereby putting in issue the soundness of the conclusions of the Secretary of War in the exercise of his discretion and judgment upon questions of fact.

That this is the position of the complainant and of his bill is evidenced by the following allegations:

And said contracts established in the plaintiff, by virtue of their terms and conditions and of the considerations moving the plaintiff and the United States thereunto, a fixed and definite property right in said towboats and barges and in said unloading facilities and in the land on which said unloading facilities were constructed, of which rights, respectively, the plaintiff could not be lawfully deprived, except by a proceeding in equity for an accounting and a determination by a decree of court of the lawful interest of each of the parties thereto in the subject matter of said contracts. And the plaintiff avers that notwithstanding such rights in the plaintiff, the defendant, John W. Weeks, *purporting to act as Secretary of War of the United States*, and the defendants, Col. T. Q. Ashburn, *purporting to act as Chief of Inland and Coastwise Service*, and the defendant, James E. Carroll, *purporting to act as United States district attorney for the Eastern Division of Missouri*, acting each for himself and in combination one with another, on or about the 3d day of March, 1923, and thereafter *did wrongfully and unlawfully undertake to declare said contracts terminated and*

did demand from the plaintiff the immediate possession of the said boats without warrant of law and did wrongfully and unlawfully and arbitrarily threaten to take by force the said towboats and barges and unloading facilities described in said two contracts and did cause to be begun the actual seizure of some of said towboats and barges by persons pretending and *purporting to represent the United States and acting under instructions of the said defendants herein.*

It is also evidenced by the complainant's reply to the Secretary of War's demand for the possession of the boats which, not denying the contract *right* to terminate the contract, says:

The exercise of your judgment is, I am convinced, based upon the inadequate and inaccurate information, and has, in fact, no substantial basis upon which to rest:

That the courts will not interfere with the exercise of the judgment and discretion of officers of a sovereignty is well settled in the decisions of this court.

In *Louisiana v. McAdoo, Secretary of the Treasury*, 234 U. S. 633, this court said:

There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is

one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution.

So, too, in the recent case of *Wells v. Roper*, 246 U. S. 335 (of which we shall have more to say hereafter), in dealing with the question of its right to review the exercise of judgment and discretion conferred upon an official, not by law, but by *contract*, as in this case, this court said:

It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding for the purposes of the argument, that *the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.*

When the allegations of the bill in this case are considered with any care, it is obvious that it is not one to restrain officious, unauthorized intermeddlers, acting entirely without authority, from interfering with complainant's rights by the unlawful seizure of

his property, and, as such, against them individually, but in essence it is one to prevent or review the exercise of official discretion by officers because of the existence of facts which did not, as claimed, justify it as exercised.

The final decree, if one be passed in this case, would be to declare the right of the complainant to the avails of the contract; that is, the possession and the right to operate the boats, and to restrain the defendants as officers from declaring a forfeiture and retaking possession of the boats, as is provided in the contract.

If the contracting parties in this case were Mr. Goltra and the corporate owner of these boats, and the defendants were the officers and agents of the corporate owner, could it for a moment be said that a bill of this sort would lie without making the corporate owner a party? The answer is obvious, because the bill would be one to specifically perform a contract and to adjudicate the lack of right and power to terminate it, which relief could only be had against the other party to the contract. So we say in this case that the United States, as owner, is a necessary and indispensable party to this bill, for that the relief sought is in effect a decree against it, and not against the individual or official defendants.

The defendant officers have no interest in the subject matter of the contract or in the controversy, except as their duty may require them as representatives of the Government to exercise discretion

under the contract. In the exercise of this discretion they act for the United States. The United States could only exercise its right of cancellation through its proper officers, and its exercise being a matter of discretion and not a mere ministerial act, it is the act of the United States and not subject to review by the courts.

If the lessor were an individual or private corporation, and a situation arose as here, the lessor would be a necessary party, and the decree would be primarily against it, and incidentally only against its agents. The lessor here being the Government can not be made a party defendant, and yet the decree would operate against and bind it as fully as if it were, for those who alone may act for it are bound, and so it is bound. A contract right belonging to the Government with respect to its own property, necessarily by reason of its movable character always in possession of human agencies, would be denied in a proceeding to which it is not a party. Such a result could only be where it in essence is a party.

THE DECISIONS.

The cases dealing with the question as to whether or not suits against officers of a State, or the United States, are, in effect, suits against the sovereignties themselves, seem to classify themselves under three heads:

- (1) Those holding that suits to enjoin the performance of official or discretionary duties of officers and agents of the sovereignty are, in effect, suits

against the sovereignty and can not be maintained without its express consent.

(2) Suits involving property rights of the sovereignty which can not be maintained without such consent.

(3) Suits affecting actions of officers and agents of the sovereignty when such actions are illegal, arbitrary, purely ministerial or otherwise in excess of authority, which are not, in effect, suits against the sovereignty.

It is our contention that this proceeding comes within one or the other, or both, of these first two classifications.

In *Hagood v. Southern*, 117 U. S. 52, the State of South Carolina issued bonds which provided that they should be receivable in payment of taxes. It was also provided in the act authorizing the issuance of these bonds that an annual tax of 3 mills for every dollar of taxable property should be levied to secure the redemption of such bonds. Subsequently the State repealed the act for the levy of a tax of 3 mills for the redemption of such bonds and enacted a statute providing that such bonds should not be receivable in payment of taxes. The plaintiffs as owners of these bonds thereupon instituted suit against defendants as officials of the State to compel them to levy the 3-mill tax for the redemption of these bonds and to accept the same in payment of taxes. The court held that the suit could not be maintained because it was, in effect, a suit against

the State of South Carolina, which had not given its consent to be sued.

The court said (l. c. 67):

These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the eleventh amendment to the Constitution of the United States.

* * * * *

If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding?

In re Ayers, 123 U. S. 443.

The State of Virginia issued bonds in which it was provided that the coupons thereto should be receivable by the State in payment of taxes. The plaintiffs were the purchasers of a large number of these bonds, some of which they sold to residents of the State at discount, to be used by the purchasers in payment of their taxes. Shortly after the purchase of these bonds the State of Virginia passed an act prescribing certain conditions which should be complied with before the coupons on these bonds should be receivable in payment of taxes, which were so

stringent as to nullify, in effect, the provisions of the bonds that the coupons thereto should be receivable in payment of taxes. The plaintiffs thereupon instituted suit to enjoin the attorney general and other officials of the State of Virginia from instituting actions for the collection of taxes against these residents of Virginia who had tendered these coupons in payment of their taxes, asserting, inter alia, that the subsequent conditions imposed by the State as a prerequisite to the right to have these coupons accepted in payment of taxes and the institution by defendants of actions for the recovery of taxes against residents of Virginia, who had tendered coupons in payment of their taxes, would impair the obligation of, and constitute a breach of, the contracts represented by the bonds.

The court held that this suit was against the State of Virginia, and, as that State had not consented to the institution thereof, it could not be maintained.

The court said (l. c. 502):

Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the acts of its General Assembly, referred to in the bill of complaint, there is, nevertheless, no foundation in law for the relief asked. *For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself.* This results from the eleventh amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity

includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought. In *Hagood v. Southern*, 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State," the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State.

* * * * *

But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.

In *Wells v. Roper*, 246 U. S. 335, decided in 1918, the Supreme Court held that where the First Assistant Postmaster General, in accordance with a decision of the Postmaster General, undertook to terminate an existing contract for automobile mail service at Washington, D. C., to make place for a similar service to be conducted by the department under a special appropriation, his action being based upon the supposed authority of the contract itself, and being purely official, discretionary, and within the scope of his duties, a suit to restrain him from annulling the contract and from interfering with its further performance was in effect a suit against the United States and was therefore properly dismissed.

This case is so like the *Goltra* case that we think it advisable to quote at length from the pertinent ex-

pressions of this court upon the question now under consideration (p. 337):

The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.

That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be

taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. *And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.* (See *Noble v. Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap v. Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620.)

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

By Executive order dated March 12, 1919, President Wilson did, in connection with the towboats and barges mentioned in the bill of complaint, "withdraw from the United States Shipping Board such part of the said power and authority so vested in me (him) under said laws with reference to the operation, management, and disposition of vessels as relates to such river barges and towboats, and do (did) hereby delegate to the Secretary of War the

power and authority so withdrawn from the United States Shipping Board, to be by the Secretary of War executed through contract or otherwise, as in his judgment may be most economical and advantageous to the United States."

Such is the authority for the making of the contract involved herein.

It is provided in the Transportation Act of 1920, Title II, section 201 (d), as follows:

Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.

The towboats and barges involved in this controversy are the only facilities within the description of this section, and are the facilities so referred to.

The case of *Wells v. Roper*, 246 U. S. 335, is in our opinion on all fours with this case. The facts in this case are, if anything, stronger than in that. In this case the boats are the property of the United States, and, even if Mr. Goltra should exercise his option, they remain the property of the United States until fully paid for. The right to the cancellation of this contract and to the return of the boats and barges to the United States was a stipulation of the

contract itself. Under this right of cancellation and to retake possession, the Government has taken and is in possession of the boats and barges. The complainant's reply to the Secretary of War set forth in the bill and the whole frame of the bill disclose that the position of the complainant is that the complainant has complied with his contract, and that the *right* to the cancellation of the contract has not accrued. This was the contention of the complainant in the Wells-Roper case, which the Supreme Court met in very apt language in the closing paragraph of its opinion, wherein it says:

And neither the question of official authority, nor that of official discretion, is affected, for present purposes, by assuming or conceding for the purposes of the argument that the proposed action may have been unwarranted by the terms of the contract, and such as to constitute an actionable breach of that contract by the United States.

In *The Siren*, 7 Wall. 152, a boat belonging to the United States collided with and sunk a boat owned by private parties. The court held that a libel in rem against the boat of the United States would not lie without the consent of the Government. It was said (l. c. 153):

It is a familiar doctrine of the common law that the sovereign can not be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public

service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the Nation of the United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States v. Clarke*.

The same exemption from judicial process extends to the property of the United States, and for the same reasons.

* * * * *

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and unavailable for any purpose.

* * * * *

So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the Government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises.

It was held, however, that the rule which precluded a suit against the United States did not apply where the United States itself instituted suit. In such instances it was held that private persons might offset against the claim of the Government any claim which they in turn had against the United States. In this case, the boat in question was a prize of war, and, upon reaching port, a libel in prize was filed against her and she was condemned and sold. It was accordingly held that the parties owning the boat which was sunk had a claim against the proceeds realized from the sale of *The Siren*, on the ground that the institution by the United States of a libel in prize against her was the institution of an action by the United States and was within the qualification or exception to the general rule, and entitled the owner of the sunken ship to damages out of the money realized upon the sale of the boat.

Oregon v. Hitchcock, 202 U. S. 60.

The State of Oregon instituted suit against Hitchcock, Secretary of the Interior, to enjoin him from allotting certain lands to Indians within the limits of the Klamath Reservation in the State of Oregon, which claimed that the land in question was swamp and overflowed land which had been granted by the United States to Oregon upon its admission into the Union, and that the title to such land was therefore in the State. The court held:

1. That while the suit was nominally against the Secretary of the Interior, the United States was the real party in interest, and the suit was in reality against the United States, because the legal title to the land in question was in the United States.

2. That a suit could not be maintained against the United States without its consent.

The court said:

The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock*, *supra*. There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian Reservation." This suit is brought by a State against the same officers to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

"Now, the legal title to these lands is in the United States. The officers named as defend-

ants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

Naganab v. Hitchcock, 202 U. S. 473.

This was a suit by the plaintiff, a member of the Chippewa Indian Tribe, to enjoin the defendant Hitchcock, Secretary of the Interior, from executing a certain act of Congress, and to compel him to account under the act of January 4, 1889, for the proceeds of the sale of land the title to which was in the Government. The court held that since the title to the lands in question was in the United States, the suit was against the United States, which could not be sued without its consent, and said:

It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no

interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is no justification to entertain this case. In respect to this question it is on all fours with *State of Oregon v. Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S. 60). That case was distinguished from *Minnesota v. Hitchcock*, 185 U. S. 373, relied on here by the appellant, in the fact that in the *Minnesota case* the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians were concerned (act of March 2, 1901, 31 Stat. 950). In this case, as in the *Oregon case*, the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner its immunity or

consented to be sued concerning the lands in question, and there is no act of Congress in any wise authorizing this action. Upon the authority of the *Oregon case* we hold that there is no jurisdiction to maintain the present suit, and the action of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of the District dismissing the complainant's bill is *affirmed*.

Stanley v. Schwalby, 162 U. S. 255.

This was an action in trespass to try title to certain land occupied by the defendants as officers of the United States. The record title to the land in question was in the United States in fee simple. The plaintiff, on the other hand, claimed title in fee simple to a certain portion of the land by virtue of a prior unrecorded deed from the original owner of the party and asserted that the United States had notice of her prior deed at the time it acquired title to the property. The United States was not formally made a party to the action, but the district attorney, acting under instructions, undertook to intervene in the action as a party defendant.

The court held that as the title to the land was in the United States, the suit, although nominally against the officials of the United States, was in reality against the Government, which could not be maintained without its consent.

The judgments of the courts of the State of Texas appear to have been largely based on *United States v. Lee* (106 U. S. 196), above

cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action, and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers (106 U. S. 199, 206, 222).

* * * * *

In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third,

to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

In *Carr v. United States*, 98 U. S. 433, 437, the court said:

We consider it to be a fundamental principle that the Government can not be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the Government suable in its courts. It is conceded in *The Siren* (7 Wall. 152) and in *The Davis* (10 id. 15) that without an act of Congress no direct proceeding can be instituted against the Government or its property. And in the latter case it is justly observed that "*the possession of the Government can only exist through its officers*"; using that phrase in the sense of any person charged on behalf of the Government with the control of the property, coupled with actual possession." If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post office or a custom-house, a prison or a fortification.

* * * * *

The cases like *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of Government

property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the Government itself seeks its rights at the hands of the court equity requires that the rights of other parties interested in the subject matter should be protected. *The Siren* was brought into the port of Boston as prize, was libeled, condemned, and sold, and the proceeds paid into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with *The Siren* during her voyage subsequent to the capture. It was held that inasmuch as the United States had resorted to the aid of the court to procure the condemnation of *The Siren*, and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the Government, might well be satisfied out of such proceeds. At the same time it was conceded that neither the Government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some act of Congress (7 Wall. 154). *The Davis* and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The Government appeared as

claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the Government could not be taken out of its own possession by any direct proceeding.

In *Louisiana v. Garfield*, 211 U. S. 70, it was held that a bill brought by the State of Louisiana against Garfield, Secretary of the Interior, to establish title to, and prevent other disposition of, lands claimed under swamp-land grants, was in reality a bill against the United States, which could not be maintained without its consent.

See also, to the same effect, *New Mexico v. Lane*, 243 U. S. 52.

Goldberg v. Daniels, 231 U. S. 218, was a petition in mandamus to compel Daniels, Secretary of the Navy, to deliver the United States cruiser *Boston* to petitioner, in which it was asserted that after survey and condemnation the cruiser had been condemned; that thereafter, and in accordance with the acts of Congress, the Secretary of the Navy had advertised the cruiser for sale and that plaintiff was the highest bidder, and that he was therefore entitled to the boat. The court held that as the cruiser in question was the property of the United States the suit could not be maintained, and said:

The United States is the owner in possession of the vessel. It can not be interfered with behind its back, and as it can not be made a party this suit must fail (*Belknap v. Schild*,

161 U. S. 10; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 606; *Oregon v. Hitchcock*, 202 U. S. 60, 69; *Naganab v. Hitchcock*, 202 U. S. 473, 476).

Belknap v. Schild, 161 U. S. 10, 11.

In this case the plaintiff, as owner of a patent for a caisson gate, brought suit against the defendants, alleging that they had infringed his patent rights and asking for an injunction and damages. The defendants were officials of the United States and averred that the only caisson gate that was under their supervision and control was located in a navy yard belonging to the United States, and that the gate had been built by other parties under a contract with the United States.

It was held that the grant of letters patent entitled the grantor to the exclusive right to the patent as against the world; that as the United States has consented, by various statutes, to the institution of suits against it upon their contracts, it might, therefore, be sued by a patentee for the use of his invention under a contract made with him by the United States or its authorized officers; that the exemption of the United States does not protect their officers from being personally liable to an action of tort by a private person whose rights of property have been invaded, but that the United States is not liable for, nor consented to be sued for, wrongs done by its officials in the discharge of their duties.

It was accordingly held that in so far as the defendants had themselves infringed plaintiff's patent

rights the suit was not against the United States, but was against the defendants personally. However, it was held that with respect to the injunction sought to restrain the use of the gate in question, the suit was against the United States because the United States owned the property.

The court in this connection said (l. c. 24):

In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. *The United States could not hold or use it, except through officers and agents.* Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; *the United States were the only real party against whom alone in fact the relief was asked and against whom the decree would effectively operate;* the plaintiff sought to control the

defendants in their official capacity and in the exercise of their official functions as representatives of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare, and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited.

In *Louisiana v. McAdoo*, 234 U. S. 627, it was held that a suit against the Secretary of the Treasury to review his action in determining the rate of duty to be collected, under statutes and treaties, on an imported article, which action involved judgment and discretion, and to mandamus him to collect a specific amount, is in effect a suit against the United States, and that as the case did not come within any of the exceptions to the established rule that the United States can not be sued without its consent, it was properly dismissed.

RESPONDENT'S AUTHORITIES.

Most of the authorities cited by respondent are cases of injunction or mandamus against Cabinet officers or others to require them to perform a purely ministerial act requiring no judgment or discretion, or cases to restrain them from abusing or overstepping their lawful powers. We have no quarrel with these

cases. If a Cabinet officer, under a mistaken view of his legal authority in connection with one of the duties of his office, does what the law prohibits, he, like anyone else, is to be restrained, and a suit for this purpose is not one against the United States. Such a suit was *Philadelphia v. Stimson*, 223 U. S. 605. This is not such a suit. By this suit the plaintiff seeks to restrain the Secretary of War from taking action authorized by a contract of the United States upon the ground that this action was an abuse of his judgment and discretion. This, under the authorities heretofore cited, the courts will not do.

We respectfully submit that the court should issue its permanent writ of prohibition as prayed for in the petition.

HARRY M. DAUGHERTY,
Attorney General.

JAMES M. BECK,
Solicitor General.

LON O. HOCKER,
Special Assistant to the Attorney General.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETI-
TION OF THE UNITED STATES
OF AMERICA, AS OWNER OF
NINETEEN BARGES AND FOUR
TOWBOATS. } No. 23

**RETURN OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF MISSOURI AND THE
HONORABLE CHARLES B. FARIS,
JUDGE THEREOF**

Now comes the District Court of the United States for the Eastern District of Missouri and comes Honorable Charles B. Faris, Judge of said Court, and, for their return to the order to show cause why a writ of mandamus and/or a writ of prohibition should not be granted, show unto the Honorable Court here, that in the matter concerning which they have been cited to appear, they proceeded with, and were proceeding in the proper exercise of their jurisdiction in such matters conferred upon them by law, and that there is no

valid reason why the rule, heretofore made upon them, should be made absolute.

The respondents admit that one Edward F. Goltra commenced a civil suit in the respondent court as alleged in the petition for a Writ of Prohibition and that Exhibit No. 1, set forth on page 13 of said petition, is a true copy of the bill of complaint filed by said Goltra. The respondents admit that the allegations in said petition concerning the contents of said bill of complaint are generally correct, with the exception of the statement that, "the right was reserved to the lessor in said contract to terminate said lease and retake possession of said boats and barges if in the judgment of the lessor, the said Edward F. Goltra had not complied with the terms and conditions on his part to be performed thereunder," which statement the respondents say was not in the bill of complaint as an examination of Exhibit No. 1 discloses.

The respondents further admit the issuance of the mandatory and restraining order and order to show cause, March 25th, 1923, as alleged as set forth; the filing of the suggestions of the Attorney General of the United States, Exhibit 2, as set forth; the filing of the returns of Col. T. Q. Ashburn and John W. Weeks, Secretary of War of the United States, Exhibits 3 and 4, as set forth; the filing of the defendant's motion to dismiss the proceedings, Exhibit 5, as set forth, and the overruling of said motion April 30th, 1923.

The respondents further state that they have no knowledge whether or not Maj. Gen. Lansing H. Beach, Chief of Engineers of the United States Army on April 27th, 1923, or at any other time terminated or can-

celled said contract for, or on behalf of, the United States and show to this Honorable Court that such letter of cancellation, if true, never appeared before the respondents, and neither it nor the Petitioner's Exhibit No. 6, is any part of the record in this case and has never been filed. Further the respondents say that said Exhibit No. 6 does not purport to be certified as a true copy of any document and the petitioner does not state in its petition that it is a part of the record in the proceedings before the respondents; that said Exhibit No. 6 was inserted between exhibits certified to by the Clerk of these respondents and Exhibit No. 6 is expressly excepted from said certification.

These respondents further say that the civil suit commenced by said Goltra against said Col. T. Q. Ashburn, John W. Weeks and James E. Carroll is not a suit against the United States, but one in which, by bill of complaint, the complainant alleges the right of possession of the towboats and barges in the complainant Goltra, and that the individual defendants, Col. T. Q. Ashburn, John W. Weeks and James E. Carroll, were unlawfully combining and conspiring to deprive the complainant of his property without due process of law; that in pursuance of their unlawful purpose they had, with force and violence, and against the protest of the complainant, taken possession of a portion of said towboats and barges and caused them to be towed or hauled away, that while complainant's bill was in the course of preparation, the defendants were proceeding, with a large force of men, to take away from complainant and remove from St. Louis all of the remaining towboats and barges, all of which more fully appears by said bill of complaint, Exhibit No. 1.

That these respondents have held and decided that said suit of said Edward F. Goltra was not a suit against the United States, but one against individual defendants who were alleged to be depriving said Edward F. Goltra of his property in violation of law.

That these respondents aver that there is an adequate remedy by appeal.

These respondents say that they are, now and at all times, ready and willing to obey whatever orders this Honorable Court may see proper to make in the premises; and aver that they issued the orders, in said suit of Edward F. Goltra, as they believe they had the right to do, relying upon the authority of the decisions of this Honorable Court and other courts; and having fully made return respectfully pray to be discharged.

*United States District
Court for E. Dist. of Mo.
By C.B. Jario Judge
C.B. Jario*

Respondents.

*James J. Davis
Hughes W. Robert
Chas. C. Chapman*
Attorneys for Respondents.